??Ef??? PROCEEDINGS AND ORDERS DATE:
102187

CASE NBR 86-1-06884 CFX
SHORT TITLE Welch, Elbert DOCKETED: Apr 18 1987
VERSUS Smith, Supt., Attica Corr.

Date	Proceedings and Orders
Apr 18 1987	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
May 26 1987	Order extending time to file response to petition until July 10, 1987.
Jun 25 1987	Brief of respondent Smith, Supt. in opposition filed.
Jul 1 1987	DISTRIBUTED. September 28, 1987
Jul 3 1987	Reply brief of petitioner Elbert Welch filed.
Oct 2 1987	REDISTRIBUTED. October 9, 1987
Oct 2 1987	REDISTRIBUTED. October 9, 1987
Oct 13 1987	Petition DENIED. Dissenting opinion by Justice White with whom Justice Blackmun joins. (Detached opinion.)
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EDITOR'S NOTE

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86-6884

IN THE SUPREME COURT OF THE UNITED STATES

ELBERT WELCH,

PETITIONER,

VS.

HAROLD J. SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY; AND MS. FRANCES MILLS, CHIEF OF MENTAL HYGIENE DEPARTMENT AT ATTICA

RESPONDENTS

RECEIVED
MAY 11 1987
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SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
APR 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Elbert Welch, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to proceed in forma pauperis in both the United States District Court, Western District of New York, and the United States Court of Appeals, Second Circuit. Attached as appendix "C" is a copy of the Second Circuit Court of Appeals order granting leave to proceed in forma pauperis and assigning counsel herein. Petitioner's affidavit in support of this motion is attached hereto and made a part hereof.

Elbert Welch
ELBERT WELCH

AFFIDAVIT

I, Elbert Welch, under penalty of perjury, declare and affirm that I am the petitioner in the above-entitled case; that I state in support of my motion to proceed in forma pauperis that because of my poverty I am unable to pay the costs of said case or give security therefor; and that I believe I am entitled to redress.

COPY

I further declare and affirm that the information I have given below relating to my ability to pay the costs of proceeding in this Court are true:

1. I am presently unemployed. My salery and wages per month are approximately $00.00 as inmate At Attica Correctional Facility.

2. I have not received withing the past twelve months any income from a business,profession or other form of self-employment,or in the form of rent payments,interests,dividends or any other source.

3. I do not own a checking or savings account.

4. I do not own any real estate,stocks, bonds,notes, automobiles or other valuable property.

5. Noone is dependent upon me for support due to my incarceration.

Elbert Welch

Elbert Welch #76-C-567
Pro Se
Attica Corr. Facility
Box 149
Attica,New York 14011

SWORN TO BEFORE ME THIS

5 DAY OF May ,1987

Matthew J Parrish

NOTARY PUBLIC

MATTHEW J. PARRISH
Notary Public, State of NY
Qualified in Wyoming Co.
Commission expires Jan. 26 19

IN THE SUPREME COURT OF THE UNITED STATES

_____TERM,1987

ALBERT WELCH,

PETITIONER

VS.

HAROLD J. SMITH,SUPERINTENDENT,ATTICA CORRECTIONAL FACILITY:AND MS. FRANCES MILLS,CHIEF OF MENTAL HYGIENE DEPARTMENT AT ATTICA

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ELBERT WELCH
#76-C-567
IN PROPRIA PERSONA
ATTICA CORRECTIONAL FACILITY
BOX 149
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CASES

Appleby v Meachum,696 F.2d 145(1st Cir. 1983)

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Cohen v Beneficial Loan Corp.,337 U.S. 541(1949)

Coopers & Lybrand v Livesay,437 U.S. 463(1978)

Cotner v Mason,657 F,2d 1390(10th Cir. 1981)

Davis v Alaska,415 U.S. 308(1974)

Firestone Tire & Rubber Co. v Risjord,449 U.S. 369(1981)

Flanagan v United States,465 U.S. 259(1984)

Henry v City of Detroit Manpower Dept.,763 F.2d 757(6th Cir.), cert. denied,__U.S.__,106 S. Ct. 604(1985)

Jenkins v Chemical Bank,721 F.2d 876(2d Cir. 1982)

Jones v WFYR Radio/RKO General,626 F.2d 576(7th Cir. 1980)

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Miller v Pleasure,425 F.2d 1205(2d Cir. 1970),cert. denied, 400 U.S. 880(1970)

Randle v Victor Welding Supply Co.,664 F.2d 1064(7th Cir. 1981)

Robbins v Maggio,750 F.2d 405 (5th Cir. 1985)

Slaughter v City of Maplewood,731 F.2d 587(8th Cir. 1984)

Smith v Bey-Petsock,741 F.2d 22(3d Cir. 1984)

Smith v Bounds,430 U.S. 817(1977)

United States v MacDonald,435 U.S. 850(1978)

OTHER AUTHORITIES

28 U.S.C.,# 1291

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Note,The Indigent's Right To Counsel In Civil Cases,76 Yale 545 (1967)

Loc.R.Prac.,W.D.C. 16D

QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court order denying appointment of counsel in a 42 U.S.C.,# 1983 civil rights case is appealable directly to the court of appeals as a collateral order ?

IN THE SUPREME COURT OF THE UNITED STATES

_____TERM,1987

ELBERT WELCH,

PETITIONER

VS.

HAROLD J. SMITH,SUPERINTENDENT,ATTICA CORRECTIONAL FACILITY: AND MS. FRANCES MILLS,CHIEF OF MENTAL HYGIENE DEPARTMENT

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner,Elbert Welch,respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 27, 1987.

OPINION AND DECISION BELOW

The Court of Appeals entered its decision and opinion below in this matter on January 27,1987. Petition for rehearing was denied on February 17 ,1987. A copy of the opinion and decision is attached hereto as Appendix A (hereinafter "App. A"). A copy of the order denying the petition for rehearing is attached hereto as Appendix B (hereinafter "App. B").***

*** App. B,while appearing to be an order staying issuance of the mandate in this case,also constitutes the order of the Second Circuit denying rehearing in this case as both the petition for rehearing and the motion for stay of mandate were included in the same application papers with the latter being requested in the alternative if the petition for rehearing was denied.

JURISDICTION

On January 27,1987, the Court of Appeals entered judgment dismissing petitioner's direct appeal from an order of the Western District Court of New York denying appointment of counsel pursuant to 28 U.S.C.,#1915(d) in a 42 U.S.C.,#1983 civil rights case on the ground that such an order denying appointment of counsel was not an appealable prior to a final judgment in the action.(App. A). Petition for rehearing was denied on February 17 ,1987.(App. B). The jurisdiction of this Court is invoked under Title 28,United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,Amendment I :

> "Congress shall make no law respecting. . .the right of the people. . .to petition the Government for a redress of grievances."

United States Constitution,Amendment V :

> "No person shall. . .be deprived of life,liberty, or property,without due process of law . . ."

United States Constitution,Amendment XIV :

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;nor shall any State deprive any person of life,liberty,or property,without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

PROCEDURAL FACTS

Petitioner is a pro se civil rights plaintiff who filed a civil rights action in the Western District Court of New York in 1979 for monetary damages and injunctive relief for violation of his civil rights. Petitioner originally sought review in the Second Circuit Court of Appeals of a previously denied motion for appointment of counsel in this matter by filing a notice of appeal dated August 7,1984,appealing from the July 18,1984, order of Magistrate Edmund F. Maxwell of the Western District Court (exh. NR. 9,10,11,12).** By order dated October 24,1984,the Second Circuit dismissed that appeal without prejudice to renewal of the appeal upon entry of a final appealable order by the District Court,holding that it had no jurisdiction to hear the appeal at that time (exh. NR. 13). The respondents had moved by notice of motion that the magistrate's decision was not a final order within the meaning of 28 U.S.C.,# 1291 since petitioner did not appeal the magistrate's decision to the District Court Judge pursuant to 28 U.S.C.,# 636 et seq.

On remand to the District Court petitioner filed a notice of motion with supporting affidavit renewing the previously denied motion for appointment of counsel (exh. NR. 14). By order dated January 11,1985,Magistrate Maxwell permitted renewal of the motion for appointment of counsel but again denied such motion for the

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** Numbers preceded by "exh. NR." refer to the various exhibits on file in the district court which constituted the record on appeal in the Second Circuit Court of Appeals;numbers preceded by simple "exh." refer to exhibits in petitioner's appendix to his brief in the Second Circuit. These exhibits are not attached hereto because of their bulkiness but are available should this Court request them.

reasons stated in the original order of July 18,1984,denying appointment of counsel (exh. NR 15,16; see also exh. 20).

In accordance with the applicable law and rules of the Western District Court petitioner immediately filed a notice of appeal to Honorable John T. Elfvin (hereinafter "Judge Elfvin") of the Western District of New York and forwarded that appeal on January 30,1985, to the District Court with proof of service of a copy on the respondents (exh. NR. 17; see also exh. 20). However,by order dated February 8,1985,and entered in the District Court Clerk's Office on February 8,1985, Judge Elfvin denied petitioner's appeal from Magistrate Maxwell's order denying appointment of counsel, holding: that Magistrate Maxwell's order denying appointment of counsel was dated January 14,1985,and was filed January 14,1985; that petitioner had no more than 10 days from the date of filing the order within which to move to have it declared clearly erroneous,viz.,until January 24,1985; that petitioner unjustifiably failed to timely seek review and therefore was foreclosed from review of the order denying appointment of counsel (exh. NR. 18).

Petitioner filed timely notice of appeal on March 11,1985, appealing to the United States Court of Appeals for the Second Circuit(exh. NR. 19). By order dated September 16,1985,the Second Circuit dismissed that appeal without prejudice and remanded the case to the District Court for reconsideration of petitioner's motion for review of the magistrate's order noting that Judge Elfvin indicated that he received new information indicating that petitioner's motion for review was timely filed and indicating the Court's willingness to consider the motion. On remand in the District Court,Judge Elfvin again denied the motion for appointment of counsel in an order dated May 16,1986,and also denied petitioner

leave to proceed on appeal in forma pauperis. The appeal in the instant matter ensued.

On January 27,1987,the Court of Appeals dismissed petitioner's direct appeal from the District Court's order denying appointment of counsel on the ground that such an order was not appealable prior to a final judgment in the action (App. A). The Court of Appeals denied a petition for rehearing (App. B).

SUBSTANTIVE FACTS

In the original civil rights complaint filed in the District Court petitioner asserted that he was denied access to the Courts relative to a then pending appeal in the State Supreme Court, Appellate Division,Fourth Judicial Department(hereinafter "Appellate Division,Fourth Department"); i.e.,petitioner asserted that he was denied access to certain trial transcripts and documents that were directly related to the pending appeal and were necessary to enable him to prepare a pro se appeal brief; that a motion for release on bail pending determination of the appeal pursuant to section 460.50 ofNew York's Criminal Procedure Law (hereinafter New York's CPL") was denied by the Appellate Division,Fourth Department,on March 26,1979,because of the denial of access to said transcripts,etc.,which prevented petitioner from preparing and filing an appeal brief; that he could have prepared and filed a pro se appeal brief prior to denial of the said bail motion had he not been denied access to said transcripts,etc.,which would have required the Appellate Division to grant the application for release on bail pending appeal.

In an order dated November 26,1979,Judge Elfvin granted leave to proceed in forma pauperis pursuant to 28 U.S.C.,§ 1915(d) and

certified that,based upon the foregoing,assertions, petitioner had asserted a non-frivolous claim of interference with his federally protected rights to access to courts (exh. NR. 2). The complaint was thereafter served on the defendants (exh. NR. 2 & 3).

Petitioner emphasizes that the only aspect of the merits of the underlying cause of action that are discussed in or germane to the issue on the instant appeal is concerned with the aforesaid denial of access to the courts. Such discussion and reference,moreover, are very minimal and indirect and do not require the Courts on appeal to become enmeshed in the merits of the cause. In addition, reference to the November 26,1979, order granting leave to proceed in forma pauperis,etc. (exh. NR. 2) can satisfy any requirement that the merits be considered by the Court on appeal in this matter, since this order clearly reached the merits of the claim of interference with federally protected rights insofar as that issue is relevant and discussed on this appeal.

By notice of motion and supporting affidavit dated April 5,1984 (exh. NR. 5), an addendum and supplemental affidavit dated April 24,1984 (exh. NR. 7), and an affidavit and addendum dated April 26,1984(exh. NR. 8), petitioner sought various forms of discovery in the District Court during discovery proceedings being conducted before Magistrate Maxwell. Petitioner sought,inter alia, the production of an appellate court order of reversal and release stemming from the aforesaid appeal, and certain information in the possession and custody of the Office of Grievance Committee,Fourth Judicial Department (this grievance committee handles grievances and complaints about professional misconduct of attorneys), all of which was clearly shown to be relevant and essential to presentation of

petitioner's case to the District Court.

Petitioner asserted in the moving papers that the Appellate Division,Fourth Department reversed and dismissed the State criminal case aforementioned on double jeopardy grounds,by order dated November 2,1979; that said reversal was granted based on the pro se appeal brief and transcripts,etc.,filed by petitioner in July of 1979 with the Appellate Division,Fourth Department; that the transcripts which formed the basis of the reversal and dismissal are the same transcripts which petitioner asserted a denial of access to court in connection with in the original civil rights complaint (exh. NR. 1); that the appellate court order of reversal and release would be relevant and needed to show and prove that,because of the terms of the order of release and matters of State law,petitioner is required to spend many more years in custody of New York's Department of Correctional Services awaiting a scheduled release, without any provision for release on bail under State law in this situation; whereas,petitioner asserted, he could and would have been released on bail pending determination of his appeal in 1979 had he not been prevented from filing his appeal brief prior to the denial of his bail motion under New York's CPL 460.50(see also exh. NR. 5,7,8)

In the moving papers below petitioner asserted that the above was relevant and constituted necessary evidence to prove,inter alia, that petitioner has suffered severe and substantial damage as a result of the interference with his right to access to court which resulted in denial of his bail motion prior to determination of the appeal as indicated,supra (see exh. NR. 5)

In the moving papers below petitioner sought to provide a basis for taking of depositions from members of the Appellate Division, Fourth Department,who decided the appeal, and members of the Grievance Committee,Fourth Department,who previously investigated and took action against a defense attorney who had been guilty of misconduct in connection with the double jeopardy issue aforesaid that was raised in and decided by the Appellate Division,Fourth Department (exh. NR. 9).

Petitioner asserted in the moving papers below that the trial judge and defense attorney in the State criminal case, acting together in a conspiracy, conspired to and did help the prosecution convict him, by creating an alleged mistrial by the use of fraud and misrepresentation, and declaring the same to afford the prosecution a more favorable opportunity to convict petitioner in a situation where the prosecution's case was going badly because of unavailability of a principal witness for the prosecution; that both the Appellate Division,Fourth Department, and the Grievance Committee,Fourth Department,made findings of fact and conclusions sustaining the charges and allegations of misconduct on the part of the culpable defense attorney and the trial judge. Petitioner sought to take depositions from these members of the Appellate Division and Grievance Committee as to their findings of fact and conclusions of law and the grounds upon which the reversal was based. Petitioner asserted that without such evidence he would be unable to prove, inter alia, the injury he suffered as a result of the interference with his right to access to court and the fact of the reversal as well since all of the action taken by the

Appellate Division and Grievance Committee was taken confidentially and the documents and papers relative thereto are claimed to be privileged. Consequently, petitioner asserted that he would surely have little hope of successfully prosecuting his case to a final resolution on the merits in the absence of the indicated evidence.

In a letter from a grievance examiner for the Grievance Committee (exh. 22 & 22(a)), after a request was made by the respondent that, as part of pretrial discovery,information pertaining to the complaint filed April 17,1979, by petitioner against the culpable attorney be provided,including a copy of the attorney's letter of response to the complaint, a copy of the disciplinary papers,findings and results stemming from the action of the Grievance Committee and the Appellate Division, the grievance examiner informed the respondent (Attorney General of New York) and petitioner that Section 90, subdivision 10 of New York State Judiciary Law prohibited disclosure of the requested information (see exh. 25). To date this information has not been received or disclosed.

Due in part to difficulty in securing the foregoing evidence necessary to a proper presentation of his case to the District Court, and in identifying and contacting essential witnesses to his case, petitioner sought to have counsel appointed to represent and assist him in further discovery proceedings in this case (see exh. NR. 9,11, 14; see also exh. 21). The procedural history of the appeals from the denial of appointment of counsel has been stated,supra,and therefore is not recounted here.

Petitioner had previously been granted postponements of the discovery proceedings on two separate occasions by Magistrate Maxwell,for the purpose of retaining counsel in this matter. The case was postponed on petitioner's request dated : August 8 and 15,

1984,to January of 1985; and November 18,1983, to March of 1984; however,petitioner was unsuccessful in his efforts to secure an attorney during these periods and also has not been released from custody as of yet from the reversal and dismissal of the case aforementioned.

There had also been a prior request to Magistrate Maxwell, in a letter dated May 30,1984, by petitioner for appointment of counsel during this discovery phase of this case to assist petitioner therein; but Magistrate Maxwell denied such request and indicated that the denial was based solely on the ground that the Magistrate was unable to secure an attorney to represent petitioner's interests (see exh. 21). It is apparent from this letter that and Magistrate Maxwell's order denying appointment of counsel that the Magistrate's real reason for denying appointment of counsel was because of the Magistrate's inability to secure an attorney to represent petitioner's interests because of the dearth of and difficulty in finding attorneys (see exh. NR. 11,p. 5; exh. 21)

However,Magistrate Maxwell indicated in his order denying counsel that he was of the view that the court order of reversal and other information sought by petitioner were irrelevant and outside the scope of discovery permissible in this case; that petitioner was a particularly capable inmate plaintiff who could do his own legal research and could conduct appropriate discovery through written interrogatories and requests for production of documents; that while the complaint itself could not be so characterized as frivolous, petitioner's preoccupation with a "secret" order of reversal was frivolous; that the complaint involves "loss of personal property" (although the claim here is interference with access to court,not loss of personal property),

making discovery easier because it concerned personnel,policies, and practices of the various institutions; and that petitioner articulated no good reason for appointment of counsel (exh. NR. 11, pp. 4,5).

Petitioner also stated as a reason for appointment of counsel that he was prevented from filing a pretrial discovery statement under Rule 16D of Local Rules of Practice,Western District Court (Loc.R.Prac.,W.D.C.),indicating the witnesses and summarizing their testimony and the physical exhibits to be adduced at trial, due to his inability to obtain the indicated evidence from the Grievance Committee and Appellate Division; and due to his inability to identify and contact certain indispensable witnesses. Petitioner asserted he could provide sufficient data to an attorney to enable him to contact and identify said indispensable witnesses (see exh. NR. 14).

Petitioner asserted that his incarceration disabled and handicapped him since it prevented him from making efforts to contact and identify the essential witnesses and prevented him from making efforts to secure the evidence related to the State criminal matter aforementioned; and prevented him from conducting appropriate examinations of witnesses during the taking of depositions which was part of the basis for the request for appointment of counsel. (see ex. NR. 14).

Petitioner also asserted that the transcripts,together with the pro se appeal brief,that have been filed with the Appellate Division and which formed the basis for the reversal,dismissal and disciplinary action in this matter aforementioned, also constitute relevant and necessary evidence which petitioner sought to obtain the

assistance of an attorney in obtaining from the Appellate Division, Fourth Department, to prove his assertions in the civil rights complaint that he could have filed an appeal brief ab initio-- and in fact later filed such pro se brief-- to require reversal and dismissal of the case had he not been denied access to the court as set forth in the complaint. By necessity the same pro se appeal brief would have required the granting of petitioner's motion for release on bail pending determination of his appeal under New York's CPL 460.50. The Appellate Division,Fourth Department, has refused to disclose this information and evidence apparently on the ground that it is privileged under section 90,subdivision 10 of New York State Judiciary Law (see exh. 25)

Furthermore, petitioner identified the defendant Harold J. Smith,Superintendent of Attica Correctional Facility, and his agents as being in possession of the appellate court order of reversal and order of release aforementioned (see exh. NR. 5,7,8). Rule 34(a) of Federal Rules of Civil Procedure (F.R.C.P.) provides that "any party" may request "any other party" to produce documents,etc., "which constitute or contain matters within the scope of Rule26(b) and which are in the possession,custody or control of the party upon whom the request is served." This provision clearly contemplates production of documents,etc.,only within the possession,custody or control of a party. However,no request has apparently been made by the respondent directly to Harold J. Smith or his agents for a copy of the order of release and order of reversal sought herein, despite the fact that their relevancy to the case was clearly shown, the parties who had possession of it was clearly indicated,and no objection to its production was made.

REASONS FOR GRANTING WRIT

ARGUMENT

The Federal Circuit Courts of Appeals appear to be in conflict on the issue involved in this case as to whether a district court order denying appointment of counsel in a civil rights case brought under 42 U.S.C.,# 1983 is appealable directly to the court of appeals as a collateral order under Cohen v Beneficial Loan Corp., 337 U.S. 541(1949). It is urged that this Court should grant the present application for a writ of certiorari to resolve this important issue concerning the collateral order doctrine of Cohen v Beneficial Loan Corp.,supra,and its applicability in this situation.

It is true that this Court will generally grant a petition for certiorari only when novel issues of national consequence or constitutional dimension are present, or where there is a conflict among appellate courts as to a particular constitutional or federal issue. E.g., Davis v Alaska,415 U.S. 308,309(1974); Katzinger v Chicago Metallic Mfg. Co.,329 U.S. 394,398(1947). However,petitioner here clearly raises compelling issues necessitating review by this Court.

Thus, three circuits presently allow appeals directly to the courts of appeals from a district court order denying appointment of counsel in a 42 U.S.C.,# 1983 civil rights case. See,e.g., Robbins v Maggio,750 F.2d 405(5th Cir. 1985)(Garwood,J.,dissenting 750 F.2d at 414 et seq.); Slaughter v City of Maplewood,731 F.2d 587(8th Cir. 1984); Brooks v Central Bank of Birmingham,717 F.2d 1340(11th Cir. 1983)(incorporating holdings of Fifth Circuit); while seven circuits (including the Second Circuit in this case) disallow such direct appeals. See,e.g.,Henry v City of Detroit

Manpower Dept.,763 F.2d 757(6th Cir.)(en banc),cert. denied, ___U.S.___,106 S. Ct. 604(1985); Kuster v Block,773 F.2d 1048 (9th Cir. 1985);Appleby v Meachum,696 F.2d 145(1st Cir. 1983); Randle v Victor Welding Supply Co.,664 F.2d 1064(7th Cir. 1981); Cotner v Mason,657 F.2d 1390(10th Cir. 1981);Smith v Bey-Petsock ***

In Smith v Bey-Petsock,supra, the Third Circuit reconsidered and overruled its earlier holding to the contrary in Ray v Robinson, 640 F.2d 474(3d Cir. 1981), primarily on authority of this Court's decision in Flanagan v United States,465 U.S. 259(1984),which restated the finality requirement of 28 U.S.C.,1291 and the collateral order exception of Cohen v Beneficial Loan Corp.,supra. The Seventh Circuit similarly overruled its earlier decision on reconsideration in Jones v WFYR Radio/RKO General,626 F.2d 576 on authority of this Court's decision in Firestone Tire & Rubber Co. v Risjord,449 U.S. 369(1981) which also restated the finality requirement of 28 U.S.C.,# 1291 and the Cohen collateral order doctrine. See,also, Robbins v Maggio,supra,where the Fifth Circuit held orders denying appointment of counsel appealable directly in light of the recent Flanagan and Firestone decisions,supra.

However,there appears to be no direct precedent by this Court as to the appealability of an order denying appointment of counsel in a 42 U.S.C.,# 1983 civil rights case. Indeed,in the present case sub judice,the Second Circuit in its decision (see App. A) reaffirmed its Miller II (Miller v Pleasure,425 F.2d 1205(2d Cir. 1970),cert. denied,400 U.S. 880(1970)) and stated that Miller II was based in part on the absence of any direct precedent of the Supreme Court in favor of appealability. The Second Circuit furhter observed that were this question of appealability before the Court

*** see 741 F.2d 22(3d Cir. 1984)

as one of first impression,the Court would find it of considerable intricacy in light of the weighty competing interests involved and the varying resolutions of sister circuits.

For the above-stated reasons and those that follow,it is submitted that the present case illustrates the need for a direct precedent by this Court in favor of appealability of a district court order denying appointment of counsel directly to the court of appeals as a collateral order under Cohen v Beneficial Loan Corp.,supra(hereinafter "Cohen").

THE DISTRICT COURT ORDER DENYING APPOINTMENT OF COUNSEL IS APPEALABLE DIRECTLY TO THE COURT OF APPEALS AS A COLLATERAL ORDER

Preliminarily,it is noted that it seems abundantly clear that the Second Circuit by allowing appeals directly to its court in cases denying appointment of counsel in Title VII civil rights cases,Jenkins v Chemical Bank,721 F.2d 876(2d Cir. 1982); and yet disallowing direct appeals in 42 U.S.C.,# 1983 civil rights cases where appointment of counsel is denied by the district court,has created a distinction without a difference and an obvious inconsistency.

As the Fifth Circuit pointed out in Robbins v Maggio,supra, there is no basis for distinguishing,for appealability purposes, between Title VII and 42 U.S.C.,# 1983 civil rights cases:"We take note that Caston (Caston v Sears,Roebuck,& Co.,Hattiesburg,Miss., 556 F.2d 1305 (5th Cir. 1977)) involved an action under Title VII, in contrast with the three cases consolidated here,all of which were filed pursuant to 42 U.S.C.,# 1983. For purposes of the issue of appealability,however, we find no significant legal distinction between a Title VII case and a # 1983 case." id.,750 F.2d at 410,

n. 6.

The cases Jenkins v Chemical Bank,supra, and Merritt v Faulkner, 687 F.2d 761 (7th Cir. 1983) further illustrate that Title VII civil rights plaintiffs and 42 U.S.C.,# 1983 civil rights plaintiffs are on equal footing and should not be treated differently.

For example,in Jenkins,supra, 721 F.2d at 879, the Second Circuit observed that the House Reports states:

> . . .by including this provision (42 U.S.C.,# 2000e-5(f)(1))in this bill,the committee emphasized that the nature of Title VII actions more often than not pits parties of unequal strength and resources against each other. The complainant,who is a member of a disadvantaged class, is opposed by an employer who not infrequently is one of the nation's major producers, and who has at his disposal a vast array of resources and legal talent. id.

Similarly,in Merrit v Faulkner,supra,687 F.2d at 764,n. 3,the Seventh Circuit noted that the layman in a 42 U.S.C.,# 1983 civil rights case often may not have the skil to perform legal research and present sophisticated legal arguments,and observed that:

> The problem is compounded by the inequality which results when the defendant,most often the state, is represented by counsel and the indigent civil litigant is not. An underlying assumption of the adversarial system is that both parties will have roughly equal resources. This assumption is destroyed when only one side is represented. See Bounds v Smith,430 U.S. 817,826, 97 S. Ct. 1491,1497, 52 L. Ed.2d 72 (1977).

see id.,ubi supra.

The Seventh Circuit in Merrit v Faulkner,supra, also stated that one important reason for representation by counsel is ensuring the efficacy and accuracy of the factfinding process (cite omitted); that quite often the factual and legal issues in a civil case are more complicated than in a criminal case. citing Note,The Indigent's Right to Counsel in Civil Cases,76 Yale L.J. 545,548(1967); further, that this often will be true in cases presenting constitutional

questions. see id.,ubi supra.

It seem clear that, although orders denying counsel may not constitute "final decisions" within the meaning of 28 U.S.C.,# 1291, they nonetheless are appealable directly to the court of appeals under the Cohen collateral order exception. The issue in Cohen was appealability of a district court order in a stockholders dirivative suit,denying a defendant's motion that the plaintiff be required to post security for costs of litigation. Although the order did not technically end the litigation on the merits, this Court held that it was nonetheless directly appealable. This Court reasoned that an order denying security for costs would be unreviewable if review was postponed until final disposition of the case on the merits. After disposition of the case on the merits,any right plaintiff might have to security would be lost. Thus this Court created the "collateral order" exception to the final judgment rule which applies when the district court order falls within:

> . . .that small class which finally determine(s) claims of right separable from,and collateral to,rights asserted in the action,too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

id.,337 US at 546

In Caston v Sears,Roebuck & Co.,Hattiesburg,Miss.,supra,the Fifth Circuit concluded with "little hesitation" that a plaintiff who was allowed to file a Title VII civil rights case in forma pauperis but was then denied appointment of counsel could immediately appeal that denial. The Fifth Circuit stated:

> Obviously,the refusal to appoint an attorney is collateral to the merits of the case. The decision to deny the assistance of an attorney to a layman unschooled in the law in an area as complicated as the civil rights field is truly too important to be deferred until a resolution on the

> merits can be had. Such an individual likely has little hope of successfully prosecuting his case to a final resolution on the merits. Thus we hold that the denial of an application to appoint counsel pursuant to Section 706(f) of Title VII is immediately appealable pursuant to 28 U.S.C.,# 1291.

id.,556 F.2d at 1308.

As demonstrated,supra,there is no basis for distinguishing, for appealability purposes,between Title VII cases and 42 U.S.C., 1983 cases. See Robbins v Maggio,supra,750 F.2d at 410,n. 6.

The Fifth Circuit in Robbins v Maggio,supra,cogently analyzed all aspects of the issue of appealability of an order denying counsel in a # 1983 case. It did so in light of this Court's decisions in Flanagan (supra), Firestone (supra) and Coopers & Lybrand v Livesay,437 U.S. 463 (1978) all of which were decided by this Court after the Fifth Circuit's Caston decision which Robbins v Maggio,supra, originated from.

The Fifth Circuit in Robbins,supra, observed that the Cohen doctrine has been restated with significance since its Caston decision. One year later, in Coopers & Lybrand,supra, the Supreme Court dealt with the appealability of a district court order denying a motion to certify a case as a class action. The Court concluded that such an order was not final nor collateral and thus not appealable prior to a determination of the case on the merits. In order to qualify as collateral, this Court stated that an order must: (1) "conclusively determine the disputed question", (2) "resolve an important issue completely separate from the merits of the action" and (3) "be effectively unreviewable on appeal from a final judgment" id.,437 U.S. at 468,Coopers & Lybrand. The first two Coopers & Lybrand elements merely track the requirements

established in Caston,supra. The third condition,however--that the order be effectively unreviewable on appeal from a final judgment--was not stated as part of the original Cohen test.

In applying the Coopers & Lybrand test in Firestone,supra, this Court held that an order denying a motion to disqualify counsel in a civil case was not appealable as a collateral order because the third Coopers & Lybrand element had not been satisfied. An order denying disqualification of counsel is reviewable as part of a final judgment, and it was found not to differ significantly from other interlocutory orders reviewable only after final judgment. id., 449 U.S. at 376. (Firestone,supra).

The Supreme Court in most recent pronouncements on the appealability of interlocutory orders held that granting of pretrial motions to disqualify defense counsel in criminal prosecutions are not immediately appealable. Flanagan v United States,supra. This Court reasoned that the Sixth Amendment's guarantee of a speedy trial required utmost strictness in the interpretation of the collateral order exception to the final judgment rule in criminal cases. id., 104 S. Ct. at 1055.

The decision in Flanagan,supra, turned on the analysis of the second (separability) Coopers & Lybrand element. This Court found that an order granting disqualification of counsel was not an issue sufficiently separable from the merits of the action to justify immediate appeal because prejudice to a criminal defendant is not presumed upon disqualification of counsel as it would be when a criminal defendant is denied an asserted right such as appointment of counsel. This Court concluded that a criminal defendant's rights

are only violated if it can be demonstrated th t a disqualification order actually prejudiced the defendant. Because actual prejudice cannot fairly be assesses until after trial, an order granting disqualification in a criminal case is not sufficiently separable from the mefits. Thus,the second (separability) Coopers & Lybrand element was found to be unsatisfied. id., 104 S. Ct. at 1056. Flanagan narrowly applies to orders granting disqualification of counsel in criminal cases.

In contrast,all three of the Coopers & Lybrand elements are satisfied by an order denying appointment of counsel in civil rights cases and those orders should be immediately appealable. Petitioner's case presents a clear example.

FINALITY OF DECISION

The first Coopers & Lybrand element is satified because the order is clearly one that conclusively determines the question of appointment of counsel. If a plaintiff chooses to go forward with his claim after denial of the motion for appointment, he must do so without the assistance of appointed counsel. In the case sub judice,the order denying counsel is clearly the last word on the petitioner's need for counsel at this stage of the case. That counsel may be appointed at some later stage is irrelevant,too, because petitioner will suffer irreparable injury and will have little hope of successfully prosecuting his case to a final resolution on the merits without the assistance of counsel.

SEPARABILITY

The second requirement of separability is met as well. As the Fifth Circuit stated in Caston,supra, "(O)bviously,the refusal to appoint an attorney is collateral to the merits of the case." id., 556 F.2d at 1308.

Notably,several Courts of Appeals in different contexts but each involving appointment of counsel in civil rights cases have held that the Courts should look only to facts known by the district court prior to trial in considering whether a plaintiff is entitled to appointment of counsel,and not in relation to what ensued at trial. See Branch v Cole,686 F.2d 264,at 266 (5th Cir. 1982)(# 1983 civil rights case);Robbins v Maggio,supra,750 F.2d at 412 (#1983 civil rights case); Jenkins v Chesical Bank,supra,721 F.2d at 060 (2d Cir. 1983) (Title VII civil rights case).** This is in complete contrast to orders conveying disqualification of counsel. See Firestone and Flanagan,supra,where the evaluation is based on prejudice at trial.

It is also significant that,insofar as the merits are discussed or relevant at all on this appeal,the district court's order granting leave to proceed in forma pauperis and finding a non-frivolous claim of interference with federally protected rights to access to courts (see exh. NR. 2) may be referred to to eliminate or minimize any risk that the court of appeals consider the merits. The same would usually be true in most # 1983 suits brought by prisoners since it is a mandatory prerequisite to maintaining such a suit that the district court certify that a non-frivolous claim of violation of federally protected rights be stated under 28 U.S.C.,# 1915. Confer Bradshaw v Zoological Society of San Diego,662 F.2d 1301,at 1309 (9th Cir. 1981)(holding district court orders denying appointment of counsel in Title VII cases directly appealable as collateral orders and noting that "(W)here the EEOC has found probable cause there is no risk of any consideration of the merits by the court of appeals. . .")

** See also Hodge v Colon,802 F.2d 58,at 62(2d Cir. 1986)(citing Jenkins and Branch with approval)

EFFECTIVE REVIEW AND IRREPARABLE INJURY

The third element of the Coopers & Lybrand test is met here, too; i.e.,the order denying appointment of counsel will be effectively unreviewable on appeal from a final judgment. In Caston, the Fifth Circuit expressed the view that a layman unschooled in the law in an area of civil rights who had been inappropriately denied assistance of counsel had little hope of successfully prosecuting his case to a final resolution on the merits. id.,556 F.2d at 1308. Indeed,there remains a great risk that a civil rights plaintiff may abandon a claim or accept an unreasonable settlement in light of his own perceived inability to proceed with the merits of his case (See Robbins v Maggio,supra,750 F.2d at 412-413) resulting in the loss of vital civil rights.

Moreover,in the case sub judice, petitioner will clearly suffer irreparable injury if review of the order denying counsel is postponed or deferred until after a trial on the merits. Petitioner is,inter alia,prevented from filing a mandatory pretrial statement under Rule 16D of Loc.R.Prac.,W.D.C., indicating the witnesses, their testimony and physical exhibits to be offered at trial,all because of the order denying him assistance of counsel to aid in securing evidence essential to his case. He will be unable to prove the severe injury he suffered from the denial of access to court complained of in the civil rights complaint herein because of the absence of the evidence which he seeks assistance of counsel to pursue and secure. Only by affording petitioner counsel now can the courts assure that petitioner's due process right to present his case to the district court will be protected.**

** 28 U.S.C.,# 1915(d) must be understood to guarantee indigents "meaningful access" to the courts as required by the Constitution. See Bounds v Smith,430 US 817,823, 97 S. Ct. 1491,1495(1977); cf. Hodge v Colon,802 F.2d 58, at 60(2d Cir. 1986).

Petitioner emphasizes that application of the third Coopers & Lybrand requirement is not whether a claim becomes jurisdictionally unreviewable,but whether it becomes effectively unreviewable. It is technically true that a litigant may proceed pro se after being denied appointment of counsel. However, it is the likelihood that a litigant will not be able effectively to prosecute his claim or to appeal that determines the reviewability of that claim rather than the theoretical existence of the right to proceed with a claim. The potential loss of the claim by petitioner here clearly involves "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." Firestone,supra, 101 S. Ct. at 675 (quoting United States v MacDonald,435 U.S. 850,860(1978);see,also, Robbins v Maggio,supra, 750 F.2d at 413.

Petitioner notes as an aside that the Ninth Circuit in Bradshaw v Zoological Society of San Diego,supra,analyzed all aspects of the issue of appealability of district court orders denying appointment of counsel in Title VII cases. This analysis was very cogently*** rendered and there is no basis for distinguishing for appealability purposes between Title VII cases and # 1983 cases. The Ninth Circuit concluded by saying, at p. 1316:

> We are concerned here not only with civil rights plaintiffs , but with civil rights defendants,and the legitimate interests of those defendants in the expeditious resolution of civil rights litigation,particularly in non-meritorious cases. We are concerned also with the effect on the administration of justice,the orderly processing of litigation generally,and the impact on all those who use our courts. We believe that all of these interests are furthered by the decision we reach here. While in a very few cases judicial resources may be utilized in an uneconomical manner,in the overwhelming majority of instances a substantial amount of judicial time and energy will be saved. In our opinion,concerns of judicial

*** See cogent and scolarly analysis of "the policy against piecemeal review" in Bradshaw,supra,662 F.2d at 1314-16,which is adopted here by reference.

> economy and the spectre of denying justice through delay do not compete in the case before us; rather both weigh in favor of finding orders of the type before us appealable. We believe that civil rights litigation will be disposed of more efficiently, economically, quickly, and fairly as a result of the decision we reach today.

id.,ubi supra.

In sum, petitioner respectfully submits that the district court order here denying appointment of counsel is clearly appealable directly to the court of appeals as a collateral order under the Cohen collateral order doctrine as restated in Coopers & Lybrand; and that this Court should grant this petition for a writ of certiorari to review the appealability issue here.

Notably, the Second Circuit in its decision in this case recognized the weighty competing interests involved here and the varying resolutions of sister circuits; and also noted that its decision was made in the absence of a direct precedent by this Court. (see App. A, 3-4). Indeed, this Court granted certiorari in Flanagan v United States,459 US 1101, 103 S. Ct. 721(1983) (to review issue of appealability of disqualification order); and in Firestone Tire & Rubber Co. v Risjord,446 US 934, 100 S. Ct. 2150(1980)(to resolve a conflict among the circuits on the appealability question of denials of disqualification motions as collateral orders under Cohen doctrine). Granting of certiorari seems entirely appropriate here.

Petitioner notes that he has not argued the merits of the issue of whether or not he is entitled to appointment of counsel since the Second Circuit did not specifically address this issue. It is believed that if this petition for a writ of certiorari is granted and a favorable decision on the appealability issue is rendered by this Court, the case would nonetheless have to be remanded to the Second Circuit Court of Appeals for a consideration of whether petitioner is entitled to appointment of counsel. However,if this Court so desires and advises,petitioner will brief the issue concerning his entitlement to appointment of counsel.

APP. A

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 655 August Term, 1987

(Submitted January 15, 1987 Decided January 27, 1987)

Docket No. 86-2200

ELBERT WELCH, JUANITA WELCH and MAE BROWN,

Plaintiffs

ELBERT WELCH,

Plaintiff-Appellant,

-against-

HAROLD J. SMITH, Superintendent, Attica Correctional Facility and MS. MILLS, Chief of Mental Hygiene Department,

Defendants-Appellees.

Before: KAUFMAN, TIMBERS and MINER, Circuit Judges.

Appeal from an order of the United States District Court for the Western District of New York (Elfvin, J.) denying appointment of counsel. We hold that an order denying a plaintiff the appointment of counsel to represent him in pursuing the merits of a suit under 42 U.S.C §1983 may not be challenged separately by a direct appeal.

Appeal dismissed.

AO 72

A

ELBERT WELCH, pro se

NANCY SPIEGEL, Assistant Attorney General, New York State Department of Law, Albany, New York (Robert Abrams, Attorney General of the State of New York, Peter H. Schiff, Deputy Solicitor General, Wayne L. Benjamin, Assistant Attorney General, of counsel)

AO 72 (Rev. 8 82)

A

KAUFMAN, Circuit Judge:

We decide today whether an order denying the appointment of counsel to enable a plaintiff to pursue a lawsuit under 42 U.S.C. §1983 is appealable prior to a final judgment in the action.

Were this question before us as one of first impression, we would find it of considerable intricacy, in light of the weighty competing interests involved and the varying resolutions of our sister circuits. Since, however, we are convinced that the issue is no longer an open one for a panel in this circuit, although some doubt may linger because our cases on the subject have not been models of clarity, we add these few words.

FACTS

Elbert Welch, a New York state prisoner, filed this civil rights action in 1979. His original claim was that various state officials had deprived him of access to his personal legal papers, but more recently his attention has focused on obtaining a "secret order" of the Appellate Division of the Supreme Court of the State of New York, which, he claims, reversed his state court conviction.

Welch filed a motion for the appointment of counsel, which was referred by the district court to United States Magistrate Edmund T. Maxwell. In a thorough opinion -- which evaluated the apparent merits of the complaint, Welch's ability to make an adequate investigation of his claims and present them to the

AO 72 (Rev. 8 82)

court, the complexity of the applicable law, and the general availability of volunteer counsel in the district -- the Magistrate denied the motion. The district judge adopted that ruling, and, after a number of intermediate procedural steps not necessary to recount, Welch filed this appeal.

DISCUSSION

Our first consideration of the issue presented here came in Miller v. Pleasure, 296 F.2d 283 (2d Cir. 1961), cert. denied, 370 U.S. 964 (1962)(Miller I). We there held that, while the question was a close one, we would resolve the doubt in favor of ruling that the denial of appointed counsel was appealable as a collateral order under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

On a later appeal of the same case, however, Miller v. Pleasure, 425 F.2d 1205 (2d Cir.), cert. denied, 400 U.S. 880 (1970)(Miller II), we expressly overruled Miller I, basing our decision on the mounting burdens on the courts of appeals and the absence of any direct precedent of the Supreme Court of the United States in favor of appealability.

This would leave the matter too clear for any extended discussion, but for our opinion three years later in U.S. v. Birrell, 482 F.2d 890 (2d Cir. 1973). There, in the course of deciding a quite distinct point, we erroneously referred to Miller I as stating the law. While our dictum in Birrell was

certainly misleading, it in no way impeached the force of the holding of Miller II. And, indeed, our most recent review of the law in a related area assumed without discussion that Miller II was the governing authority, U.S. v. Harris, 707 F.2d 653, 658 (2d Cir.), cert. denied, 464 U.S. 997 (1983).

Today, we reaffirm explicitly that it is. No case in this circuit subsequent to Miller II, whether of a panel or of the en banc court, has held that orders such as the one here are appealable. In those circumstances, we think it plain that the law of this circuit is that an order denying a plaintiff the appointment of counsel to represent him in pursuing the merits of a suit under §1983 may not be challenged separately by a direct appeal.

Since this case presents no question regarding the possible availability of other routes to review (such as by way of application for an extraordinary writ), or of the possible availability of direct review where the request for the assistance of counsel is made in conjunction with an order that is itself appealable (such as a preliminary injunction), we leave exploration of those issues to another day.

Accordingly, Welch's attempted appeal is dismissed.

United States Court of Appeals APP. B

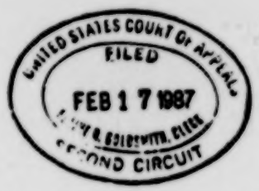
PRO SE

FOR THE

SECOND CIRCUIT

2/17

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of February one thousand nine hundred and eighty seven.



Elbert Welch,

Appellant,

v.

Harold J. Smith and ano.,

Appellees.

86-2200

A motion having been made herein by appellant pro se for stay of the mandate pending petition for a writ of certiorari

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted to the extent that this Court's mandate herein is stayed pending the timely filing with the Supreme Court the United States of a petition for a writ of certiorari, and in the event of such timely filing until twenty-one days after that Court's action on the petition or ruling on the merits.

Irving R. Kaufman
WHT / per IRK
RJM / per IRK

IRK WHT RJM

Circuit Judges

United States Court of Appeals PRO SE

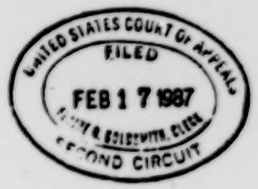
FOR THE

SECOND CIRCUIT

2/17

APP. B

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of February one thousand nine hundred and eighty seven.



Elbert Welch,

Appellant,

v.

Harold J. Smith and ano.,

Appellees.

86-2200

A motion having been made herein by appellant pro se for stay of the mandate pending petition for a writ of certiorari

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted to the extent that this Court's mandate herein is stayed pending the timely filing with the Supreme Court the United States of a petition for a writ of certiorari, and in the event of such timely filing until twenty-one days after that Court's action on the petition or ruling on the merits.

Irving R. Kaufman
WHT / per IRK
RJM / per IRK

IRK WHT RJM

Circuit Judges

APP. C

United States Court of Appeals

FOR THE

SECOND CIRCUIT

PRO SE

8/26

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 27th day of August, one thousand nine hundred and eighty-six.

Elbert Welch,

Appellant,

v.

Harold J. Smith, and ano.,

Appellees.

86-2200

A motion having been made herein by appellant pro se for leave to proceed in forma pauperis

Upon consideration thereof, it is
Ordered that said motion be and it hereby is GRANTED. It is further Ordered that counsel, for the purposes of prosecuting the appeal, be appointed in accordance with the usual procedures of this court.

Wilfred Feinberg
WILFRED FEINBERG, Chief Judge

Richard J. Cardamone
RICHARD J. CARDAMONE, Circuit Judge

Robert J. Kelleher
*/ ROBERT J. KELLEHER, District Judge

WF RJC Kelleher

*/ Sitting by designation.

APP. D

Civ 79-280 Elbert Welch et al vs. Harold J. Smith et al

DATE 1979	NR	PROCEEDINGS
Apr 10	1	Filed complaint
10		Js 5 made
ov 26	2	Filed decision and order granting pltf to proceed in forma pauperis etc-Elfvin, D.J. Notice & copies to Pltf., U.S. Atty. and F-218 Robert Abrams, Esq.
26		Issued summons & 2 copies.
1980		
Feb 20	3	Filed S&C & Mars ret served on Supt. Harold J. Smith, served 2/13/80.
20	4	~~Filed S&C & Mars ret served on Supt. Harold J. Smith, served 2/13/80.~~
27	5	Filed deft, Harold J. Smith's Answer to the complaint.
1984		
Apr 9	5	Filed pltf's (Welch) Notice of request for production of document consisting of a court order pursuant to FRCP Rule 34
19	6	Filed Affidavit of Paul F. McCarthy.
23		Pltf's motion to compel production of documents. Deft will comply, matter moot.
27	7	Filed pltf's addendum d& supplemental affidavit in support of request for production of document
May 1	8	Filed pltf's affidavit & addendum & supplemental request for productio of documents
June 21	9	Filed Pltf's Notice of Motion for Appointment of Counsel.
28	10	Filed order referring this case to Magistrate Maxwell to hear & determine all non-dispositive pretrial motions, etc.--Elfvin, DJ. Notice & copy to Pltf & Paul McCarthy. Docketed 6/28/84.
July 18	11	Filed Decision & Order denying pltf's motion for appointment of counsel, etc.--Maxwell, Magistrate. Notice & copy to Pltf & Paul McCarthy. Docketed 7/18/84. F-274
Aug. 7	12	Filed Pltf's. Notice of Appeal (cy. mailed to Mr. McCarthy and to Clerk, CCA with copy of docket entries)
Sept.13		Original papers, docket entries and Clerk's certificate mailed to Clerk, CCA
Nov. 5	13	Filed cert. cy. of Motion of Defts.-Appellees for dismissal of the appeal for lack of jurisdiction and Order of the U.S. Ct. of Appeals granting same w/o prejudice to renewal of the appeal upon entry of a final judgment (cy. given to Magistrate Maxwell
20	14	Filed pltf Welch's Notice of Motion & Affidavit in Support of Motion to Renew Motion for Appointment of Counsel.
Dec. 10		Original papers returned from CCA
1985		
Jan 14	15	Filed order directing that the Mag's Decision & Order be filed w/the Clerk; advising all parties that they may file objections w/i 10 days; directing the Clerk to send a copy of the Decision & Order & this order to pltf & defts' atty.--Maxwell, Mag. Notice & copy to pltf & Paul McCarthy. Docketed 1/15/85. F-280
14	16	Filed Decision & Order granting pltf's motion for reconsideration, but denying pltf's motion for appointment of counsel for the reasons set out in the court's decision of 7/18/84, etc.-- Maxwell, Mag. Notice & copy to pltf & Paul McCarthy. Docketed 1/15/85. F-280
Feb 5	17	Filed pltf's Objections to Magistrate's Decision.
8	18	Filed order denying pltf's appeal from Mag Maxwell's order denying appointment of counsel, etc.--Elfvin, DJ. Notice & copy to Pltf & Paul McCarthy. Docketed 2/8/85. F-281

APP. D

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO 79-280E
Elbert Welch, et al.	Harold J. Smith, etc. & l	PAGE 2 OF ___ PAGES

DATE 1985	NR	PROCEEDINGS
Mr. 11	19	Filed Notice of Appeal of Pltf. Elbert Welch with affidavit pursuant to Rules 10 and 11, FRAP (cy. mailed to Mr. McCarthy and to Clerk, CCA with copy of docket entries)
29	20	" Memorandum re Pltf's. explanation for late filing of his appeal to District Court from Magistrate's decision and order-Elfvin, DJ (notice & cy. to Pltf. and Mr. McCarthy) Docketed 3/29/85 F-282
29		Original papers, docket entries and Clerk's certificate mailed to Clerk, CCA
ec. 2	21	Filed cert. cy. of Order of the U.S. Ct. of Appeals dismissing the appeal w/o prej. and remanding to Dist. Ct. for reconsideration of Pltf. Elbert Welch's motion for review, Judge Elfvin having received new information re timeliness of filing of objections to the Magistrate's order and indicated his willingness to reconsider
5		Original papers returned from CCA
12	22	Filed Order making the mandate of the U.S. Ct. of Appeals the judgment of this court-Curtin, DJ (notice & cy. w/cy. of mandate to Pltf. pro se and to Mr. McCarthy) Dktd. 12/12/85 F-291

State of New York) SS: RE: WELCH V SMITH,
County of Wyoming) ACTION.NO

Elbert Welch, under penalty of perjury, declares and affirms that:

On the 14 day of April, 1987, I have served the within petition for writ of certiorari and motion to proceed in forma pauperis upon the parties below, by sealing the same in separate postpaid envelopes and depositing them in an official mail box at Attica Correctional Facility, to be served via United States Postal Services:

ONE ORIGINAL

CLERK OF COURT
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

ONE COPY

HON. ROBERT ABRAMS
ATTORNEY GENERAL
STATE OF NEW YORK
THE CAPITOL
ALBANY, NEW YORK 12224

DATED: April 14, 1987
ATTICA CORRECTIONAL FACILITY

I DECLARE UNDER PENALTY OF PERJURY
THAT THE FOREGOING IS TRUE AND
CORRECT
EXECUTED ON April 14, 1987

Elbert Welch

ELBERT WELCH PRO SE
UNSWORN DECLARATION UNDER PENALTY OF
PERJURY UNDER 28 U.S.C., # 1746

Elbert Welch
Elbert welch # 78-C-567
Attica Corr. Facility
Box 149
Attica, New York 14011

APP. E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELBERT WELCH, #76-C-567,

Plaintiff,

vs.

CIV 79-280E

HAROLD J. SMITH, Superintendent, Attica Correctional Facility, and MS. FRANCES MILLS, Chief of Mental Hygiene Department,

Defendants.

DECISION and ORDER

By order of the Hon. John T. Elfvin, plaintiff's motion for appointment of counsel was referred to the undersigned. The following constitutes my decision and order in this matter.

Plaintiff, an inmate at Clinton Correctional Facility, filed this suit in 1979 claiming he was denied access to certain legal papers. He now moves for appointment of counsel pursuant to 28 U.S.C. §1915(d).

In support of his motion, plaintiff asserts that he is indigent and cannot afford a private attorney; that his incarceration prevents him from retaining a private attorney on a contingent fee basis; that appointment of an attorney will materially aid the court by assisting in plaintiff's

E

depositions of the defendants; that counsel will enable plaintiff to identify and contact his witnesses who are not incarcerated; and that counsel will be able to obtain a particular piece of documentary evidence from the Appellate Division of the New York Supreme Court.

A district court has broad discretion to appoint counsel for indigents under 28 U.S.C. §1915(d). Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981). Indeed, a failure of a district court to exercise its discretion under §1915(d) is an abuse of that discretion. Ray v. Robinson, 640 F.2d 474 (3rd Cir. 1981); McKeever v. Israel, 689 F.2d 1315 (7th Cir. 1982). Some of the factors which should be considered in deciding whether or not to appoint counsel include:

a. whether the claim is of sufficient merit;

b. whether the party is able to adequately investigate the factual issues in the dispute;

c. whether the only evidence which will be introduced is in the form of conflicting testimony;

d. whether the party is capable of presenting his or her own case;

e. whether the applicable law is complex or unclear.

McKeever v. Israel, 689 F.2d at 1320.

Counsel is normally not appointed in prisoner civil rights cases stemming from a combination of lack of resources to pay attorneys fees, lack of a sufficient number of attorneys willing to handle cases on a volunteer basis, absence of sufficiently meritorious claims, and a capability on the part of many inmate plaintiffs to adequately articulate their own claims. However, the courts have exercised their discretion to appoint counsel under the appropriate circumstances. See, e.g., Manning v. Lockhart, 623 F.2d 536 (8th Cir. 1980) (case presents serious allegations of disputed facts and credibility of witnesses); Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980) (serious factual disputes and multiple meritorious claims); Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980) (plaintiff unable to draft proper complaint); Holmes v. Goldin, 615 F.2d 83 (2nd Cir. 1980) (counsel appointed to help amend complaint).

In the present case, appointment of counsel at this stage is unwarranted. Although plaintiff's complaint in 1979 stated an arguably valid claim with respect to access to his personal legal papers, during the last year his attention has focused on obtaining a "secret order" of the Appellate Division which he claims reversed his State court conviction.

While his original complaint cannot be so characterized, his present preoccupation with a "secret order" is certainly frivolous in the context of this suit. His justification for appointment of counsel is to enable counsel to aid in recovering this document and to assist in the depositions of members of the Appellate Division and the State Judicial Conduct Committee. Without venturing an opinion as to whether plaintiff may have a valid ground for a habeas corpus petition on the basis of these new allegations, the discovery of this matter is clearly outside the scope of discovery permissible with respect to the instant §1983 action. Accordingly, appointment of an attorney to aid in pursuit of this irrelevant material is improper.

Additionally, Welch has demonstrated that he is a particularly capable inmate plaintiff. Although for reasons of his own, he has elected not to participate in telephone conferences with the court during the discovery phases of this case, his written submissions demonstrate that he has an excellent command of the English language and the capability to do his own legal research. While he admittedly does not have the access to the outside world that a non-inmate has, his capability to conduct appropriate discovery through

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written interrogatories and requests for document production is at least as good as the average inmate plaintiff. In particular, in light of the fact that the incident complained of involves a loss of personal property while in the custody of the Department of Corrections, his discovery is that much easier, involving, at least to some extent, the personnel, policies, and practices of the various institutions to which he is currently committed.

Plaintiff has articulated no good reasons justifying the appointment of counsel at this time. While I recognize that each application for counsel must be judged on its own merits, I am compelled to observe that the huge volume of prisoner civil rights cases and the corresponding dearth of available counsel has made it difficult to find attorneys to represent even the most deserving cases.

Accordingly, plaintiff's motion for appointment of counsel is DENIED.

So ordered.

Edmund F. Maxwell
United States Magistrate

DATED: Buffalo, New York
July 18th 1984

EXHIBIT 27

APP. I

86-6884

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELBERT WELCH,

Plaintiff

v. CIV-79-280E

HAROLD J. SMITH, Superintendent, Attica Correctional Facility & 1,

Defendants

SIR/MADAM: Take notice of a MEMORANDUM of which the within is a copy, ~~duly granted in the within entitled action on the _____ day of _____~~, and entered in the Office of the Clerk of the United States District Court, Western District of New York on the 29th day of March, 1985.

Dated: Buffalo, New York

March 29, 1985

JOHN K. ADAMS, CLERK
U.S. District Court
Western District of New York
U.S. Courthouse
Buffalo, New York 14202

TO: Elbert Welch, Pro Se ✓
Paul F. McCarthy, Esq.

EXHIBIT 27

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELBERT WELCH,

Plaintiff,

-vs-

SUPERINTENDENT HAROLD J. SMITH and MS. FRANCES MILLS, Chief, Department of Mental Hygiene, both of Attica Correctional Facility,

Defendants

CIV-79-280E

MEMORANDUM

Plaintiff, proceeding pro se and in forma pauperis, had moved for appointment of counsel and such motion and other non-dispositive matters were referred to a magistrate of this Court under 28 U.S.C. §636(b)(1)(A). By a Decision and Order filed July 18, 1984 the magistrate denied the motion and plaintiff on August 7, 1984 filed his Notice of Appeal to the United States Court of Appeals for the Second Circuit. Such appeal was dismissed for lack of finality. On November 20, 1984 plaintiff renewed his motion for appointment of counsel and the magistrate, while noting the requirement of subsection 636(b)(1)(A) and rule 36B of this Court's Local Rules of Practice that a written appeal from his earlier Decision and Order must have been filed within ten days of the service of a copy of the order upon the party thereby aggrieved, viewed the renewed motion as a motion for reconsideration and authored January 11, 1985 a further Decision and Order which was filed January 14th and which again denied plaintiff's motion. Simultaneously the

magistrate signed and filed a separate Order in which rule 36B was set forth in full. On February 4th plaintiff's appeal (dated January 30th) to this Court was filed and, on February 8th, this Court's Order was filed denying such appeal as untimely. On March 11th plaintiff filed his Notice of Appeal, dated February 12th, to the United States Court of Appeals for the Second Circuit from said Order. Received with the Notice of Appeal was plaintiff's letter of February 12th to the Clerk of this Court which, in pertinent part, stated:

> "I am a bit troubled by a matter which I wish to address to this Clerk's Office regarding this matter as follows:
>
> "Magistrate Edmund F. Maxwell denied my motion for appointment of counsel in an order granted January 11, 1985, entered in the office of the Clerk of this Court on January 14, 1985, and dated January 15, 1985. I received the order with notice of its entry on January 30, 1985, at Auburn Correctional Facility. I am presented [sic] in possession of the envelope in which the order was received by me, and it is postmarked by the U.S. Post Office January 29, 1985, and it is stamped as received at Auburn Correctional Facility on January 30, 1985, the date I received it.
>
> * * * * *
>
> "*** the failure to timely appeal was not due to any neglect or error on my part and, as I stated, I forwarded my appeal immediately on January 30, 1985, the date that I received the order in the mail."

A Notice of Appeal having been filed this Court is without jurisdiction to act in the matter. It suffices to note that, if I had had plaintiff's contentions in front of me, they would have been taken into consideration. Whether

I

plaintiff might thereby have gained the status of a viable appellant in this Court would have been considered and determined. If plaintiff would thereby have been successful in having this Court reach the merits of his appeal from the magistrate's Decision and Order, such would have been weighed and resolved.

Dated: Buffalo, N. Y.
March 29, 1985

John T. Curtin
U.S.D.J.

IRX

APP. J

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of September, one thousand nine hundred and eighty-five.

FILED
SEP 19 1985
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

Present:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE IRVING R. KAUFMAN,

HONORABLE THOMAS J. MESKILL,

Circuit Judges.

ELBERT WELCH, JUANITA WELCH, and MAE BROWN,

Plaintiffs,

ELBERT WELCH,

Plaintiff-Appellant,

-against- 85-2066

HAROLD J. SMITH, Superintendent of Attica Correctional Facility, and MS. MILLS, Chief of Mental Hygiene Department,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from said District Court be and it hereby is dismissed without prejudice and remanded.

J

1. After denying Welch's motion for review because of late filing, Judge Elfvin received new information indicating Welch's objections to the magistrate's order were timely filed. The district judge has expressed his willingness to reconsider Welch's motion and decide it on the merits. We believe he should be given the opportunity to do so.

2. Accordingly, the appeal is dismissed without prejudice and remanded to the district court for reconsideration of Welch's motion for review.

Wilfred Feinberg
WILFRED FEINBERG,
Chief Judge,

Irving R. Kaufman
IRVING R. KAUFMAN,

Thomas J. Meskill
THOMAS J. MESKILL,
Circuit Judges.

N.B. Since this statement does not constitute a total opinion of this court [illegible] to all cases, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APP. K

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELBERT WELCH

-vs- Civ- 79-280E

SUPERINTENDENT HAROLD J. SMITH, Etc. & 1

SIR/MADAM: Take notice of an ORDER, ~~JUDGMENT~~

of which the within is a copy, duly granted in the within entitled action on the 16th day of May, 1986, and entered in the Office of the Clerk of the United States District Court, Western District of New York on the 19th day of May, 1986.

Dated: Buffalo, New York
May 19, 1986

EDWARD P. GUETH, JR., Clerk
United States District Court
Western District of New York
U.S. Court House
Buffalo, New York 14202

cc: Mr. Elbert Welch
Paul F. McCarthy, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELBERT WELCH,

Plaintiff

-vs-

Civ-79-280E

MEMORANDUM

and

ORDER.

SUPERINTENDENT HAROLD J. SMITH
and MS. FRANCES MILLS, Chief,
Department of Mental Hygiene,
both of Attica Correctional Facility,

Defendants

The plaintiff, proceeding pro se and in forma pauperis, had moved for appointment of counsel and such motion and other non-dispositive matters were referred to a magistrate of this Court pursuant to 28 U.S.C. §636(b)(1)(A). By a Decision and Order filed July 18, 1984 the magistrate denied the motion and the plaintiff filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit August 7, 1984. Such appeal was dismissed for lack of finality. On November 20, 1984 the plaintiff renewed his motion for appointment of counsel and the magistrate, while noting the requirement of subsection 636(b)(1)(A) and rule 36B of this Court's Local Rules of Practice that a written appeal from his earlier Decision and Order must have been filed within ten days of the service of a copy of the order upon the party thereby aggrieved, viewed the renewed motion as a motion for reconsideration and authored January 11, 1985 a further Decision and

Order which was filed January 14th and which again denied plaintiff's motion. Simultaneously, the magistrate signed and filed a separate Order in which rule 36B was set forth in full. On February 4th the plaintiff's appeal (dated January 30th) to this Court was filed and, on February 8th this Court's order was filed denying such appeal as untimely. On March 11th the plaintiff filed his Notice of Appeal, dated February 12th, to the United States Court of Appeals for the Second Circuit from said Order. Received by this Court along with the Notice of Appeal was plaintiff's letter of February 12th to the Clerk of the Court which indicated that he had not received the magistrate's January 14th Decision and Order until January 30th. This Court issued a Memorandum indicating that, had it known of the plaintiff's contentions, it would have taken them into consideration indetermining whether the plaintiff had been a viable appellant. The Court of Appeals dismissed the plaintiff's appeal without prejudice and remanded for reconsideration of Welch's motion to review.

The Court finds credible Welch's claim that he failed to receive notice of the magistrate's January 14th Decision and Order until January 30th. It is clear that Welch could not have complied with Fed. R. Civ. P. rule 72(a) and this Court's Local rules of Practice rule 36(B) and that he promptly acted to submit objections to the magistrate's decision. In the interest of justice this Court's Order filed February 8, 19

is vacated and it is determined that the plaintiff timely filed his objections to the magistrate's Decision and Order filed January 14, 1985.

This court has reviewed the plaintiff's motion papers, the magistrate's decisions, the plaintiff's objections to the denial of appointment of counsel and all other relevant papers. The magistrate's decisions are well reasoned and can not be held to be clearly erroneous.

Accordingly, it is hereby ORDERED that the plaintiff's appeal of the magistrate's July 14, 1985 Decision and Order is denied.

Dated: Buffalo, New York
May 16, 1986

John T. Elfvin
U.S.D.J.

CONCLUSION

FOR THE FOREGOING REASONS, PETITIONER ALBERT WELCH RESPECTFULLY REQUESTS THAT THE WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

DATED: April 14, 1987
ATTICA CORRECTIONAL FACILITY

Elbert Welch
RESPECTFULLY SUBMITTED,

PETITIONER
ELBERT WELCH # 76-C-567
IN PROPRIA PERSONA
ATTICA CORRECTIONAL FACILITY
BOX 149
ATTICA, NEW YORK 14011

RECORDS COPY
PLEASE RETURN TO ROOM
1702

APP. F.

United States Court of Appeals
FOR THE SECOND CIRCUIT

WELCH,

Plaintiff-Appellant

-against-

SMITH, et al.,

Defendants-Appellees

Use short title

84-2261

NOTICE OF MOTION

State type of motion

to dismissal of appeal

MOTION BY: *(Name and tel. no. of law firm and of attorney in charge of case)*

Peter G. Crary, Assistant Attorney General
New York State Department of Law
The Capitol, Albany, New York 12224

OPPOSING COUNSEL: *(Name and tel. no. of law firm and of attorney in charge of case)*

Elbert Welch, pro se
Clinton Correctional Facility
Box B, Dannemora, New York 12929

Has consent of opposing counsel:
A. been sought? ☐ Yes ☒ No
B. been obtained? ☐ Yes ☒ No
C. service been effected? ☒ Yes ☐ No
D. oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b)) October 16, 1984

Has argument date of appeal been set:
A. by scheduling order? ☒ Yes ☐ No
B. by firm date of argument notice? ☐ Yes ☒ No
C. If Yes, enter date _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:

United States Magistrate Edmund F. Maxwell

Brief statement of the relief requested:

Dismissal of the appeal for lack of jurisdiction and such other and further relief as the court may deem proper.

Complete Page 2 of This Form

By: *(Signature of attorney)*

Peter G. Crary

Signed name must be printed beneath

Peter G. Crary

Appearing for *(Name of party)*

Harold J. Smith

9/28/84
Date

Appellant or Petitioner: ☐ Plaintiff ☐ Defendant
Appellee or Respondent: ☐ Plaintiff ☒ Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted ~~denied~~ without prejudice to renewal of the appeal upon entry of a final judgment. The magistrate's order is not a final order under 28 U.S.C. § 1291, and an interlocutory appeal under 28 U.S.C. § 1292(b) is not proper at this time.

FILED SE
10/23
ENG LMP BCP

P.A. of mail

APP. G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELBERT WELCH,

Plaintiff,

-vs-

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,
et al.,

Defendants.

CIV- 79-280E

SIR/MADAM: Take notice of an ORDER, ~~a judgment~~

of which the within is a copy, duly granted in the within entitled action on the 11th day of January, 1985, and entered in the Office of the Clerk of the United States District Court, Western District of New York on the 14th day of January, 1985.

Dated: Buffalo, New York
January 15, 1985

JOHN K. ADAMS, CLERK
U.S. District Court
Western District of N.Y.
U.S. Courthouse
Buffalo, New York

cc: Paul F. McCarthy, Esq.
Elbert Welch

6

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELBERT WELCH,

Plaintiff,

vs.

HAROLD J. SMITH, Superintendent, Attica Correctional Facility, and MS. FRANCES MILLS, Chief of Mental Hygiene Department,

Defendants.

CIV 79-280E

ORDER

Pursuant to 28 U.S.C. §636(b)(1)(A), it is hereby

ORDERED, that the attached Decision and Order be filed with the Clerk of this Court. All parties are advised that they may file objections to the proposed memorandum as provided in Western District of New York Local Rule 36(B):

> All orders of the magistrate issued pursuant to these rules as authorized by 28 U.S.C. §636(b)(1)(A) shall be final unless, within ten days after being served with a copy of the magistrate's order, a party files with the clerk of the court and serves upon opposing counsel a written appeal from such order specifying the party's objections. The specific matters to which the party objects and the manner in which it is claimed that the order is clearly erroneous or contrary to law shall be clearly set out in writing.

Let the Clerk send a copy of this order and a copy of the Decision and Order to the plaintiff and the attorney for the defendant.

So ordered.

Edmund F. Maxwell
United States Magistrate

DATED: Buffalo, New York
January 11, 1985

6

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELBERT WELCH,

Plaintiff,

vs.

HAROLD J. SMITH, Superintendent, Attica Correctional Facility, and MS. FRANCES MILLS, Chief of Mental Hygiene Department,

Defendants.

CIV 79-280E

DECISION and ORDER

Plaintiff seeks reconsideration of my earlier denial of his motion for appointment of counsel which was referred to me to decide pursuant to 28. U.S.C. §636(b)(1) by order of the Hon. John T. Elfvin dated June 26, 1984.

The earlier decision, Welch v. Smith, CIV No. 79-280E (July 18, 1984), sets out the factual circumstances leading up to his motion. Subsequent to my denial of plaintiff's motion, he sought appellate review by filing a Notice of Appeal to the United States Court of Appeals for the Second Circuit on August 7, 1984. Such review was denied on the grounds that my decision denying the motion was not a final order of the court, and hence not reviewable. Plaintiff believes that, had he availed himself of the provision in 28 U.S.C. §636(b)(1)(A) providing for review of a magistrate's decision by a district court judge, he would then have received a final order which would entitle him to appeal to the Second

Circuit. He asserts that he did not avail himself of that opportunity because he was not aware of it.

In his affidavit, plaintiff states that his object by this motion for reconsideration is to obtain a final order which, if it denies his application for counsel, will presumably be appealable.

Fed.R.Civ.P. Rule 72 and Western District of New York Local Rule 36 provide for objections to a magistrate's decision to be filed within ten days of entry of the magistrate's order. However, in this case plaintiff is appearing pro se and, as a layman is entitled to some discretion with respect to the application of the Federal Rule.

Therefore, in order to give the pro se plaintiff the review he seeks, I shall consider plaintiff's motion for appointment of counsel on the merits once again. I note that plaintiff's affidavit in support of this motion fails to address the rationale which I used for denying the motion the first time. I can find no basis in plaintiff's affidavit for changing the analysis in my first decision. Accordingly, I adopt the rationale of my July 18th decision in full, and find that plaintiff's motion for appointment of counsel should be denied.

Accordingly, plaintiff's motion for reconsideration is GRANTED, and plaintiff's motion for appointment of counsel is DENIED for the reasons set forth in my decision of July 18, 1984.

So ordered.

Edmund F. Maxwell
United States Magistrate

DATED: Buffalo, New York
January 11, 1985

APP. H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELBERT WELCH,

Plaintiff,

-vs-

HAROLD J. SMITH, Superintendent, Attica Correctional Facility, et al.,

Defendants.

CIV-79-280E

SIR/MADAM: Take notice of an ORDER, XXXXXXXXXXXX of which the within is a copy, duly granted in the within entitled action on the 8th day of February, 1985, and entered in the Office of the Clerk of the United States District Court, Western District of New York on the 8th day of February, 1985.

Dated: Buffalo, New York
February 8, 1985

JOHN K. ADAMS, CLERK
U.S. District Court
Western District of N.Y.
U.S. Courthouse
Buffalo, New York

cc: Paul F. McCarthy, Esq.
Elbert Welch

H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELBERT WELCH,

Plaintiff,

-vs-

HAROLD J. SMITH, Superintendent, Attica Correctional Facility, and Ms. FRANCES MILLS, Chief of Mental Hygiene Department,

Defendants.

CIV-79-280E

ORDER

Plaintiff by papers filed here February 5, 1985 seeks to appeal from a pretrial order of Magistrate Edmund F. Maxwell (to whom this case was referred pursuant to 28 U.S.C. §636(b)(1)(A)) denying, without prejudice to later renewal, plaintiff's motion for appointment of counsel pursuant to 28 U.S.C. §1915(d). Such order is dated January 11, 1985 and was filed January 14, 1985. By the provisions of rule 72(a) of the Federal Rules of Civil Procedure and of rule 36B of this Court's Local Rules of Practice any effort by the plaintiff to have this Court declare the magistrate's order clearly erroneous must have been made not later than January 24, 1985, the tenth day following such filing. That plaintiff may not have been trained in the law and may not possess an attorney's expertise is not any excuse; the order went forward to plaintiff together with another order of the same date which expressly referred to rule 36B and set it forth in full.

It is hereby ORDERED that plaintiff's appeal from said order denying appointment of counsel is denied.

Dated: Buffalo, N. Y.
February 8, 1985

John T. Elfvin
U.S.D.J.

MEMORANDUM

May 5,1987

FROM: Mr. Elbert Welch, #76-C-567, Attica Correctional Facility

TO: Joseph F. Spaniol, Jr.,Clerk
C/O Sandra Elliot Spagnolo
United States Supreme Court

RE: Elbert Welch v Harold J. Smith,86-2200,Petition For Writ of Certiorari

Dear Madam Spagnolo:

By letter dated April 24,1987, you acknowledged receipt of my petition for a writ of certiorari in the above matter and you returned my petition to me. You indicated my affidavit of indigency must be notarized,referring to Rule 46.

I am returning my petition for a writ of certiorari with all-accompanying papers to you together with a notarized affidavit of indigency.

Thanyou for your concern in filing my papers and promptly notifying the Second Circuit Court of Appeals that a timely petition for certiorari has been filed in this Court so that the order staying the proceedings in this matter will continue to be effective until a decision on the merits of my petition is made. (SEE ATTACHED APPENDIX "B")

Sincerely,

Elbert Welch
Elbert Welch

ORIG.:JFS
C/O SEP W/ENCLOSURES
CC:EW/file

April 14,1987

[illegible]
Attica Correctional Facility
Box 149
Attica,New York 14011

Clerk Of Court
Supreme Court of The United States
Washington,D.C. 20543

RE: [illegible]

Dear Clerk Of Court:

Enclosed please find a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit in connection with the above matter.

As I am an indigent,pro se petitioner, I respectfully request this Court to make allowance for my case as provided in Rule 45.3 of the Supreme Court Rules as I have not been able to present my present petition on paper 8½ by 13 inches in size as provided in Rule 33.1. My petition is typed on paper approximately 8½ by 11 inches in size.

Also,by Order dated February 17,1987, the Second Circuit granted a stay of issuance of the mandate in this matter which was conditioned on my timely filing this petition with this Court for a writ of certiorari.(see Appendix B). In accordance with Rule 41(b) of Federal Rules of Appellate Procedure I respectfully request the Clerk of this Court to file a notice with the Clerk of the Court of Appeals for the Second Circuit that I have filed a petition for writ of certiorari in this Court.

Thankyou in advance for your attention and concern in this matter.

Sincerely,

Albert Welch

CC:[illegible]/file
CC:Atty. Gen. Of N.Y.,
Albany Office

RECEIVED
APR 18 1987
OFFICE OF THE CLERK
SUPREME COURT, U.S.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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SUPREME COURT, U.S.

No. 86-6884

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ELBERT WELCH,

Petitioner,

-against-

HAROLD J. SMITH, Superintendent, Attica Correctional Facility, and MS. FRANCES MILLS, Chief of Mental Hygiene Department,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
The Capitol
Albany, New York 12224
Telephone (518) 474-7168

Dated: June 23, 1987

O. PETER SHERWOOD
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

NANCY A. SPIEGEL
Assistant Attorney General

Of Counsel

Question Presented for Review

Whether a district court order denying appointment of counsel in an action under 42 USC § 1983 is appealable as a collateral order prior to entry of a final judgment.

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No. 86-6884

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ELBERT WELCH,

Petitioner,

-against-

HAROLD J. SMITH, Superintendent, Attica Correctional Facility, and MS. FRANCES MILLS, Chief of Mental Hygiene Department,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Citations to Decisions Below

The opinion of the United States Court of Appeals for the Second Circuit sought to be reviewed is reported at 810 F2d 40 (2d Cir 1987). The memorandum and order of the District Court for the Western District of New York is unreported. It is included as Appendix K to the petition for certiorari.[1]

Preliminary Statement

In this proceeding pursuant to 42 USC § 1983, petitioner, an inmate appearing pro se, seeks this Court's review of the Court of Appeals' dismissal of his appeal to that court. The Court of Appeals held that the interlocutory district court

1 The appendices to the petition will hereafter be cited as "(App ___)".

order at issue, which had denied petitioner's request for appointment of counsel under 28 USC § 1915(d), could not be challenged separately by direct appeal but could only be reviewed after a final judgment (App A).

Statement of the Case

Petitioner, an inmate at the Attica Correctional Facility, commenced this civil rights action on or about April 10, 1979. In his complaint, petitioner challenged the conditions of his confinement and alleged that he had been denied access to certain legal papers. He subsequently has become preoccupied with a "secret order" supposedly made by the Appellate Division, Fourth Department, of the New York Supreme Court reversing his underlying criminal conviction (Pet, pp 6-9).

In June, 1984, petitioner moved pursuant to 28 USC § 1915(d) for the appointment of counsel to represent him in this matter. Respondents took no position with respect to the requested relief. Pursuant to 28 USC § 636(b)(1)(A), the motion was referred to a magistrate for determination. The magistrate denied the motion without prejudice to renewal (App E), finding that petitioner had not justified the appointment of counsel at that time (id., p 5). The magistrate further noted that petitioner was an articulate inmate who appeared capable of adequately presenting his own claim (id., p 4).

Petitioner did not request reconsideration of the magistrate's order by the district court as authorized by 28 USC § 636(b)(1)(A). Instead, he sought to appeal the order directly to the Court of Appeals. Pursuant to respondents' motion, the Court of Appeals dismissed the appeal on October 24, 1984 "* * * without prejudice to renewal of the appeal upon entry of a final judgment" (App F).

On or about November 17, 1984, petitioner moved before the magistrate to renew his request for appointment of counsel. In a decision and order filed on January 14, 1985 (App G), the magistrate did reconsider the matter on the merits and determined to adhere to his earlier decision.

On or about January 30, 1985, petitioner sought review by the district court of the magistrate's second order. By order filed February 8, 1985, the court denied petitioner's appeal for lack of timeliness, citing petitioner's failure to file his objections within the 10-day period specified in FRCP 72(a) (App H). Petitioner thereafter took a second appeal to the Court of Appeals.

Subsequently, on March 29, 1985, the district court took the unusual step of filing a memorandum in which the court discussed petitioner's explanation for the delay in seeking reconsideration of the magistrate's order. Petitioner had apparently alleged in a letter to the court that although the magistrate's order was filed on January 14, 1985, he did not receive it until January 30, 1985. He also claimed that the envelope in which the order arrived was postmarked January 29, 1985. The district court, after noting that it was without jurisdiction in the matter because a notice of appeal had been filed, stated that petitioner's contentions would have been considered had the court been aware of them prior to issuing its February 8, 1985 order (App I).

In light of this memorandum, the Court of Appeals on September 16, 1985 dismissed petitioner's appeal without prejudice and remanded the matter to the district court for reconsideration of petitioner's request for review of the magistrate's decision (App J).

In accordance with the Court of Appeals' instructions, the district court reviewed and accepted petitioner's excuse for his

lack of timeliness and proceeded to consider the merits of petitioner's appeal (App K). The district court found that the magistrate's refusal to appoint counsel for petitioner was reasonable, and not clearly erroneous, and therefore denied the relief sought (id.). Petitioner then took his third appeal to the Court of Appeals. On January 27, 1986, that court dismissed the appeal, holding on the basis of stare decisis that orders denying appointment of counsel are not directly appealable in the Second Circuit (App A).

ARGUMENT

POINT I

THIS COURT HAS RECENTLY DENIED CERTIORARI IN A CASE PRESENTING THE SAME ISSUE AS THAT PRESENTED HERE. THERE HAS BEEN NO CHANGE IN CIRCUMSTANCES SUCH THAT A DIFFERENT RESULT SHOULD OBTAIN NOW.

In Henry v City of Detroit Manpower Dept., 763 F2d 757 (6th Cir en banc), cert denied, ___ US ___, 106 S Ct 604 (1985), this Court declined, over dissents from Justices White and Blackmun, to review the identical question presented by the case at bar, i.e., whether denial of appointment of counsel in a civil rights action is immediately appealable.[2] We submit that the question is no more worthy of this Court's review today than it was less than two years ago.

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2 The Henry case also presented the issue of the appealability of orders denying counsel in Title VII actions. This Court similarly chose not to consider that question.

While it is concededly true, as petitioner states, that there is a conflict among the circuits on this matter,[3] this in and of itself does not warrant the granting of certiorari. First, the conflict petitioner cites was just as evident in 1985 when certiorari was denied in Henry. Second, the difference of opinion among the circuits has in fact been diminishing in recent years. For the most part, although not unanimously, as the Courts of Appeals have reconsidered the question presented in light of this Court's decisions on related issues in cases such as Flanagan v United States, 465 US 259 (1984), and Firestone Tire and Rubber Co. v Risjord, 449 US 368 (1981), the courts have concluded that the denial of counsel in civil rights actions are not appealable. See Smith-Bey v Petsock, 741 F2d 22 (3d Cir 1984), overruling Ray v Robinson, 640 F2d 474 (3d Cir 1981), and Randle v Victor Welding Supply Co., 664 F2d 1064 (7th Cir 1981), overruling Jones v WFYR Radio/RKO General, 626 F2d 576 (7th Cir 1980). In addition, after the Henry case, the one circuit to address the instant issue for the first time has weighed in with the majority. See Miller v Simmons, 814 F2d 962 (4th Cir 1987).

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3 As of this writing, a total of eight circuits, seven in addition to the Second Circuit, hold that orders denying appointment of counsel in section 1983 actions are not appealable. Miller v Simmons, 814 F2d 962 (4th Cir 1987); Henry v City of Detroit Manpower Dept., supra; Kuster v Block, 773 F2d 1048 (9th Cir 1985); Smith-Bey v Petsock, 741 F2d 22 (3d Cir 1984); Appleby v Meachum, 696 F2d 145 (1st Cir 1983); Randle v Victor Welding Supply Co., 664 F2d 1064 (7th Cir 1981); Cotner v Mason, 657 F2d 1390 (10th Cir 1981). Two, perhaps three, circuits hold that such orders are appealable. Robbins v Maggio, 750 F2d 405 (5th Cir 1985) (but see dissenting opn of Garwood, J., 750 F2d at 414 et seq.); Slaughter v City of Maplewood, 731 F2d 587 (8th Cir 1984). See also, Brooks v Central Bank of Birmingham, 717 F2d 1340 (11th Cir 1983), incorporating the holdings of the Fifth Circuit.

Third, neither the Fifth nor the Eighth Circuits (which deem these orders appealable) have examined the issue in light of this Court's most recent discussion of a related matter in Richardson-Merrell, Inc. v Koller, 472 US 424 (1985).[4] In Richardson-Merrell, this Court reviewed its prior decisions and held that "orders disqualifying counsel in civil cases, like orders disqualifying counsel in criminal cases [see Flanagan v United States, supra] and orders denying a motion to disqualify in civil cases [see Firestone Tire and Rubber Co. v Risjord, supra], are not collateral orders subject to appeal as 'final judgments' within the meaning of 28 U.S.C. § 1291". 472 US at 440. In light of this Court's strong expression of concern with the avoidance of piecemeal litigation so evident in Richardson-Merrell, we submit that the few dissenting circuits would be hard-pressed to adhere to their views were the question to be presented to them anew.

Finally, it is important to note that what is involved here is purely a rule of procedure, not a question of substantive federal law. The rule of nonappealability adopted by the majority of the circuits does not preclude appellate review, it merely requires litigants to await the final outcome of their lawsuits. The issue here is basically a judicial "housekeeping" matter as to which national uniformity is not necessarily of inherent value or importance.

For all of these reasons, certiorari should be denied.

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4 Robbins v Maggio, 750 F2d 405 (5th Cir 1985), was decided on January 14, 1985, while the Richardson-Merrell opinion was not issued until June 17, 1985. We also note that certiorari was denied in Henry v City of Detroit Manpower Dept. on December 16, 1985, after Richardson-Merrell.

POINT II

AN ORDER DENYING APPOINTMENT OF COUNSEL IN A CIVIL RIGHTS ACTION IS NOT APPEALABLE UNTIL ENTRY OF A FINAL JUDGMENT.

It is a given that under 28 USC § 1291, the Courts of Appeals have jurisdiction only to review final decisions of the district courts. The conclusion of eight of the Courts of Appeals that orders denying appointment of counsel are nonfinal and therefore nonappealable is, we submit, clearly correct. Indeed, that conclusion is virtually compelled by the three recent decisions of this Court discussed earlier which have strongly underscored the importance of section 1291's finality requirement and the avoidance of piecemeal litigation.

In Richardson-Merrell, Inc. v Koller, 472 US 424 (1985), Flanagan v United States, 465 US 259 (1984), and Firestone Tire and Rubber Co. v Risjord, 449 US 368 (1981), this Court held that neither the denial nor the granting of a motion for disqualification of counsel was a final, appealable order.[5] In so doing, the Court reiterated that section 1291 generally prohibits an appeal until a district court renders a decision "that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment'". Firestone Tire and Rubber Co., 449 US at 373, quoting Coopers and Lybrand v Livesay, 437 US 463, 467 (1978), and Catlin v United States, 324 US 229, 233 (1945). The Court observed that this finality requirement serves three salutary purposes. It minimizes appellate interference with a trial court's many pre-trial decisions, avoids harassment of opponents by successive

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5 In Flanagan, the Court expressly likened a disqualification order to an order denying appointment of counsel in a criminal case. See p 11, post.

interlocutory appeals and promotes efficient judicial administration. Flanagan v United States, 465 US at 263-264. As the Court discussed in Richardson-Merrell, allowing immediate review of nonfinal orders would cause unreasonable disruption, delay[6] and expense. 472 US at 430. Such detriments are particularly unjustifiable in light of the fact that "[m]ost pretrial orders of district judges are ultimately affirmed by appellate courts". Richardson-Merrell, 472 US at 434, citing 15 Wright, Miller and Cooper, Federal Practice and Procedure, § 3907, p 433 (1976).

Section 1291's final judgment rule is subject to the very narrow "collateral order" exception, which applies to a small class of orders which are considered final although they do not end the litigation. See Cohen v Beneficial Industrial Loan Corp., 337 US 541 (1949). To fall within this exception,

> "* * * an order must at a minimum satisfy three conditions: It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.' Coopers and Lybrand v. Livesay, 437 U.S. 463, 468 (1978)." Richardson-Merrell, 472 US at 431.

The district court order and the underlying orders of the magistrate here meet none of the requirements for appealability under the final collateral order exception.

First, the magistrate's original order plainly did not foreclose a renewal of petitioner's request for appointed counsel at a subsequent stage of the litigation. The order

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6 The instant case is a perfect example. Petitioner's motion for appointment of counsel was denied by the magistrate on July 18, 1984. There has now been a delay of nearly three years occasioned by petitioner's attempts to obtain interlocutory appellate review.

states, "In the present case, appointment of counsel at this stage is unwarranted" (App E, p 3; emphasis added). Clearly, the magistrate has left open the possibility of appointing counsel for petitioner at a later time if, as the case progresses, such action becomes advisable. Thus, the orders involved here do not "conclusively determine the disputed question". See Firestone Tire and Rubber Co., 449 US at 380 (Rehnquist, J., concurring); Miller v Simmons, 814 F2d at 965, 966; Henry v City of Detroit Manpower Dept., 763 F2d at 761-762.

Second, the orders do not resolve an "issue completely separate from the merits of the action". Pursuant to 28 USC § 1915(d), appointment of counsel for an indigent litigant in a civil case is not a matter of right; it lies within the court's discretion. Maclin v Freake, 650 F2d 885 (7th Cir 1981). In exercising that discretion, a district court must consider, inter alia, whether the plaintiff's claim appears on its face to be not only nonfrivolous, but of sufficient merit to warrant representation by counsel. 650 F2d at 887. Indeed, the magistrate's denial of petitioner's motion here was based in part upon this consideration.[7] It is clear, therefore, that in determining a litigant's entitlement to counsel, a district court must necessarily consider issues enmeshed in the merits of

7 The magistrate noted that while petitioner's original complaint was not frivolous, his later preoccupation with a "secret" state court order supposedly reversing his conviction is frivolous in the context of this section 1983 action (App E, pp 3-4). Since petitioner's rationale for seeking appointed counsel concerns his need for assistance in pursuing discovery on this matter, the magistrate's evaluation of its facial merits was clearly necessary in order to rule on the motion.

his underlying cause of action.[8] See Miller v Pleasure, 425 F2d 1205 (2d Cir), cert denied, 400 US 880 (1970).

The third and perhaps most clearly dispositive reason for not permitting appellate review at this time is that the denial of counsel is not "effectively unreviewable on appeal from a final judgment". This Court has held that this condition is met only "'where denial of immediate review would render impossible any review whatsoever'" because the order "'involved an asserted right the legal and practical value of which could be destroyed if it were not vindicated before trial'". Firestone Tire and Rubber Co. v Risjord, 449 US at 376, 377, quoting United States v Ryan, 402 US 530, 533 (1971), and United States v MacDonald, 435 US 850, 860 (1978), respectively.

Because an erroneous denial of counsel can be fully remedied by a post-judgment appeal, reversal and a new trial,[9] such a determination does not fall within the narrow category of

8 Petitioner claims that the orders at issue in Flanagan and Firestone require a showing of prejudice after trial on appellate review, whereas review of orders denying appointment of counsel are based on the court's knowledge at the time. He then argues that while review of the former involve the underlying merits, review of the latter do not. Petition, pp 19-20, 21. This Court has said, however, that it "has never held that prejudice is a prerequisite to reversal of a judgment following erroneous disqualification of counsel in either criminal or civil cases". Richardson-Merrell, 472 US at 438. In any event, it does not follow that review of orders denying counsel do not involve the merits -- they simply involve an assessment of the merits at a different point in time.

9 The Second Circuit has held that the remedy for an erroneous denial of counsel actually involves two steps. First, counsel must be appointed and the matter remanded to the district court. Second, the plaintiff and his new counsel must demonstrate that the plaintiff was in fact prejudiced at his trial. Hodge v Police Officers, 802 F2d 58, 62 (2d Cir 1986). Thus, only if the plaintiff demonstrates actual prejudice resulting from the failure to appoint counsel will a new trial be ordered.

appealable collateral orders. Smith-Bey v Petsock, 741 F2d 22 (3d Cir 1984); Appleby v Meachum, 696 F2d 145 (1st Cir 1983); Randle v Victor Welding Supply Co., 664 F2d 1064 (7th Cir 1981); Cotner v Mason, 657 F2d 1390 (10th Cir 1981). As the Court stated in Firestone Tire and Rubber v Risjord, 449 US at 378, "interlocutory orders are not appealable 'on the mere ground that they may be erroneous'". When an appeals court vacates a judgment based upon an erroneous denial of counsel and the district court subsequently grants a new trial, the only harm suffered by the plaintiff is the delay caused by the need to retry the case. Although this may be a substantial inconvenience, it is no more than that experienced by litigants whenever a trial judge has committed an error necessitating a retrial.

The conclusion that reversal of the final judgment followed by a new trial provides complete redress for an erroneous and prejudicial denial of counsel follows ineluctably from the decisions in Richardson-Merrell, Firestone and Flanagan. As the Third Circuit pointed out in Smith-Bey v Petsock, the denial of appointed counsel is indistinguishable for appealability purposes from the disqualification of a party's choice of counsel, since the final outcome could be affected in the same manner in both cases. 741 F2d at 25-26. Indeed, this Court in Flanagan expressly compared these two kinds of orders with respect to the effectiveness of a post-judgment appeal:

> "Similarly, post-conviction review is concededly effective to the extent that petitioners' asserted right is like the Sixth Amendment rights violated when a trial court denies appointment of counsel altogether * * *." 465 US at 268.

In sum, the court below correctly dismissed petitioner's appeal for lack of jurisdiction.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Dated: Albany, New York
June 23, 1987

Respectfully submitted,

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EDITOR'S NOTE

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NO. 86-6884 (4)

ORIGINAL

Supreme Court, U.S.
FILED
JUN 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

_____TERM,1987

ELBERT WELCH,

PETITIONER

VS.

HAROLD J. SMITH,SUPERINTENDENT,ATTICA CORRECTIONAL FACILITY;AND MS. FRANCES MILLS,CHIEF OF_MENTAL HYGIENE DEPARTMENT

RESPONDENTS

REPLY BRIEF

REPLY BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Hodge v Colon,802 F2d 58(2d Cir. 1986)

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Richardson-Merrell,Inc. v Koller,472 US 424 (1985)

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United States v Proctor & Gamble Co.,356 US 677(1958)

United States v Ryan, 402 US 530 (1971)

Wood v Breier,54 F.R.D. 7 (E.D.Wis. 1972)

REASONS FOR GRANTING WRIT

ARGUMENT (REPLYING TO RESPONDENTS' OPPOSITION BRIEF)

Respondents argue in their opposition brief to the writ of certiorari that, inter alia, in light of this Court's strong expression of concern with avoidance of piecemeal litigation in Richardson-Merrell, Inc. v Koller,472 US 424 (1985), the few circuits dissenting would be hard-pressed to adhere to their views were the question involved here presented anew. (Opp. Br.,p. 6). Respondents claim that Petitioner's case presents a clear example of delay involved in immediate appeals since there has been a delay of nearly three years since the magistarte denied the motion for appointment of counsel on July 18,1984. (Opp. Br.,p. 8,n. 6). Respondents concede, however, that there is a conflict among the circuits on the issue presented herein. (Opp. Br.,p. 5).

Respondents also argue that the district court order involved here did not foreclose renewal of petitioner's request for appointment of counsel at a later stage of the litigation; that the issue is not separate from the merits since it can be remedied by a post judgment appeal,reversal and new trial,etc. (Opp. Br.,pp. 8-11)

This brief is submitted to discuss the issues of the piecemeal policy, effective review and irreparable injury, and the final judgment rule in light of Respondents' claims.

SEPARABILITY

By examination of the relation between the substance of the order denying appointment of counsel and the merits of the cause of action itself, it becomes abundantly clear that the order is "separable from, and collateral to" the merits. It does not involve claims of right asserted in the action per se; and the order is clearly too independent of the cause to require that appellate consideration be deferred until the whole case is adjudicated. See Bradshaw v Zoological Society of San Diego,662 F2d 1301, at p. 1307 (9th Cir. 1981) (discussed in Petitioner's original petition).

It is obvious,too, that the decision denying appointment of counsel is not merely a "step" towards final judgment on the merits. The issue concern Petitioner's need for assistance of counsel to enable him to present his case to the district court, in the absence of which Petitioner will surely have little hope of successfully doing.

Indeed, in a November 26,1979 order granting Petitioner leave to proceed in forma pauperis in this matter, Judge Elfvin found that Petitioner stated a non-frivolous claim of interference with federally protected rights to access to courts regarding the denial of access to the transcripts that formed the basis of the reversal

and dismissal of the criminal case at issue. Since the order has clearly reached the merits of the cause insofar as the merits are discussed or germane to the issues on this appeal, the Court of Appeals may simply refer to that order to satisfy any requirement that the merits be considered.

Altough the magistrate's decision did briefly refer to the merits of the case as Respondents point out (Opp. Br.,p.9,n. 7), and although Petitioner does discuss very briefly a certain aspect of the merits, the order and discussion are only indirect and incidental; further, Petitioner discusses only a certain aspect of his claims. The order and discussion are not in any manner dependent on the merits in such a way as to render the district court's order unappealable as a collateral order and does not require the Court of Appeals to become "enmeshed" in the issues involved in a determination of the merits.

EFFECTIVE REVIEW AND IRREPARABLE INJURY

There are two aspects to the reviewability question. The concerns are, first, that "crucial collateral claims (will) be lost. . ." Firestone Tire & Rubber Co. v Risjord,449 US 368,(1981) (quoting Matthews v Eldridge,424 US 318,331, n. 11 (1976)); and, second, the need to construe the finality requirement "so as not to cause. . .potentially irreparable injuries to be suffered." ibid,

An appealable order must involve an "asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial" United States v McDonald,435 US 850,860 (1978). The claimed right must be such that "denial of immediate review would render impossible any review whatsoever. . ." United States v Ryan,402 US 530,533 (1971)

Petitioner must show that the order necessarily causes injury that will be irreparable unless appealed immediately.

The Ninth Circuit in Bradshaw,supra, 662 F2d at 1312 noted that the denial of counsel to litigants creates the same clear threat of irreparable injury in all cases:

> . . .it is not difficult to imagine--indeed, it is impossible to ignore--the irreparable injury that would result from a refusal to review an order denying a civil rights litigant appointment of counsel. Because the likelihood that an appellant in Miss Bradshaw's position will be unable to proceed through trial and obtain effective review of the order is so high, and the prejudice inherent in proceeding to trial without counsel is so great, we do not view the injury that would inevitably result from a refusal to review the order before us as speculative or hypothetical.

id.,ubi supra.Confer Caston v Sears,Roebuck & Co.,Hattiesburg,Miss., 556 F2d 1305,1308 (5th Cir. 1977):

> Obviously,the refusal to appoint an attorney is collateral to the merits of the case. The decision to deny the assistance of an attorney to a layman unschooled in the law in an area as complicated as the civil rights field is truly too important to be deferred until a resolution on the merits can be had. Such an individual likely has little hope of successfully prosecuting his case to a final resolution on the merits.

ibid. Robbins v Maggio,750 F2d 405,412(5th Cir. 1985),accord.

Petitioner's case sub judice presents an even more compelling case than the preceding ones and the irreparable injury here is much clearer; for Petit ner in the instant case is prevented from filing a pretrial statement under Rule 16D of Loc.R.Prac.,W.D.C., indicating the witnesses,their testimony and physical exhibits to be offered in evidence at trial,all because the district court here refused to appoint counsel to aid Petitioner in securing evidence material and essential to presentation of his case during this discovery phase of the case. Filing a pretrial statement under Rule 16D is mandatory; but even if it were not,Petitioner will suffer irreparable injury if he is required to proceed to trial without the indicated evidence pertaining to the state criminal matter and the indicated essential witnesses.

This case is presently in the discovery stage in the district court; and it has long been held that it is essential in any civil rights case that the plaintiff be given every reasonable opportunity develop and fashion a remedy for any grievance he may legitimately harbor. And the federal rules of discovery are meant to insure that no relevant fact remain hidden.*** See Wood v Breier,54 F.R.D. 7,13 (E.D.Wis. 1972);cf. United States v Protor & Gamble Co.,356 US 677 682 (1958)("a trial (should be) less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest extent"). (FOOTNOTE CONTD. ON NEXT PAGE)

***Respondents claim that Petitoner's preoccupation with a "secret" order reversing his conviction is frivolous as noted by the magistrate. (Opp. Br.,p. 9,n. 7). Such "secret" order in fact exists and claims of privilege against disclosure are being made pursuant to Section 90,subd. 10, of N.Y.S. Judiciary law by both the Appellate

THE FINAL JUDGMENT RULE

The finality requirement encompasses a number of specific policies ofter lumped together under the pejorative heading of "the policy against piecemeal review". In re Continental Investment Corp.,637 F2d 1,6(1st Cir. 1980). First it "emphasizes the deference that appellate courts owe to the trial judge" Firestone,101 S. Ct. at 673; or, conversely, confines the courts of appeal to their proper task of reviewing, rather than supervising, the work of the district court;second, the finality requirement avoids "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise. . ." Cobbledick v United States, 309 US 323,325(1940). The final concern is with avoiding "the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." Eisen v Carlisle & Jacquelin,417 US 156,170 (1974).

As to the first concern,the unequivocal nature of the district court's refusal to appoint counsel is plain; the decision was final in this respect. Nor will a determination on this appeal in any

(FOOTNOTE CONTD. FROM PREVIOUS PAGE)

*** Division,Fourth Department and the Grievance Committee,Fourth Department as to the information pertaining to the reversal as well as the disciplinary action taken against the trial judge and culpable defense attorney. If Petitioner is not appointed counsel to assist in securing this evidence during this discovery stage,he will not be able to present his case to the district court for the reasons aforesaid. Petitioner must file a pretrial statement prior to trial and in the absence of this evidence he cannot do so. This clearly will irreparably injure Petitioner because his case may well be dismissed because of this. As discussed herein, this consideration should outweigh any concerns of inconvenience or piecemeal review.

way interfere with the future actions of the trial judge since a determination as to appellant's entitlement to appointment of counsel does not affect the trial judge's ruling on the merits. Compare Bradshaw,supra,662 F2d at 1314.

As to the second concern, the order at issue eliminates any basis for suspicion that the appeal has been interposed to harass or for mere tactical reasons. Petitioner's need for counsel is genuine and,indeed, was occasioned by the failure of respondents to comply with Petitioner's discovery demands in the district court. As is argued herein and in the original petition, Petitioner has little hope of successfully prosecuting his case to a final resolution on the merits in absence of the evidence and information sought through discovery in this case. There is absolutely no basis upon which it can be said that Petitioner appealed the order to obstruct "just claims"; rather, he did so to vindicate his rights. Compare Bradshaw,supra, 662 F2d at at 1315.

The last concern involves a tension that sometimes exists between allowing immediate review and avoiding delayed resolution of the overall cause of action; and a legitimate concern over the potential misallocation of judicial resources. Justice Frankfurter observed: "This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice." Radio

Station WOW,Inc. v Johnson,326 US 120,124 (1945)

As the Ninth Circuit noted, where plaintiffs are erroneously denied the assistance of counsel,the policy of judicial economy is clearly served by permitting an appeal immediately from the order denying counsel. Bradshaw,supra, at p. 1315. Petitioner's case at bar presents a clear example; for only by affording counsel now can this Court assure that Petitioner's right under due process requirements and First Amendment requirements to present his case to the district court will be protected.*** The appointment of counsel would also relieve Petitioner, the Respondents, and the court alike, from the need to muddle through a sham of a trial, subsequent appeal, and another trial and appeal following the appointment of counsel. The first trial in Petitioner's case would be meaningless and in an important sense, this case does not involve a mere prospect of relitigation, but rather the prospect that any meaningful litigation must await appointment of counsel that is at issue here. cf. Bradshaw,supra, at p. 1315,n. 36.

The alternative of denying review would only assure that justice is delayed, and more likely denied, and guarantee that the resources of the court and the parties would be senselessly dissipated in the process. The Supreme Court has recognized that considerations of judicial economy, usually thought to be opposed to, and there-

***Petitioner emphasizes that 28 U.S.C.,#1915(d) must be understood to guarantee indigents "meaningful access" to the courts as required by the constitution. See Bounds v Smith,430 US 817,823(1977);cf. Hodge v Colon,802 F.2d 58,at 60 (2d Cir. 1986),Merritt v Faulkner, 697 F2d 761, at 763(7th Cir. 1983)

fore to be balanced against, allowing immediate review, may give way in view of the potential harm attendent on delaying review of the order: Among "the considerations that always compete in the question of appealability, the most important. . .are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." Dickinson v Petroleum Conversion Corp.,338 US 507,511 (1950)(footnote omitted) The potential harm attendent on delaying review here is plainly such as to outweigh concerns of inconvenience and piecemeal review.

The Ninth Circuit also observed that judicial economy will generally be served by permitting an appeal from such orders since affirmance on appeal may well cause such plaintiffs to abandon their case rather than proceed through trial in an obviously hopeless cause; this is especially true where the court of appeals affirms that plaintiff cannot make even the minimal showing of merit necessary. However,absent review and affirmance, there is a strong possibility that plaintiffs will attempt to survive a trial without counsel, in hope that when they lose,they will obtain a lawyer and a new trial through post-trial appeal, and ultimately will have the opportunity to persuade the court of appeals of the merit of their claim. See discussion in Bradshaw,supra, at pp. 1315-1316.

In sum,Petitioner submits that considerations of judicial economy, the potential harm on delaying review and other factors relevant to determining the appealability question presented here,

all militate in favor of allowing direct appeal from orders denying appointment of counsel. In any event, a direct precedent by this Court to resolve the conceded conflict among the circuits on the issue seems highly desirable.

The decision of the Second Circu it is concededly in conflict with other circuits on the appealability issue; Petitioner believes the Second Circuit has decided the appealability issue of collateral orders in a manner in conflict with applicable decisions of this Court; and Petitioner believes that the Second Circuit has decided the appealability issue which is an important question of federal law which has not been, but should be, settled by this Court. For these reasons, this Court should grant the writ of certiorari to review the judgment of the Second Circuit Court of Appeals.

DATED: JUNE 28th ,1987
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ATTICA,NEW YORK 14011

SUPREME COURT OF THE UNITED STATES

ELBERT WELCH

86-6884 *v.*

HAROLD J. SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES HENRY MILLER

86-7132 *v.*

R. D. SIMMONS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 86-6884 AND 86-7132. Decided October 13, 1987

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The issue here is whether an order denying a civil rights plaintiff's motion for appointment of counsel is immediately appealable under 28 U. S. C. § 1291, as interpreted by *Cohen* v. *Beneficial Industrial Loan Co.*, 337 U. S. 541 (1949), and its progeny. In both of these cases petitioners brought their actions under 42 U. S. C. § 1983, and sought appointment of counsel under 28 U. S. C. § 1915(d). The district courts denied those motions and petitioners appealed. In *Welch* v. *Smith*, although stating that if the question were before the court "as one of first impression, we would find it of considerable intricacy, in light of the weighty competing interests involved and the varying resolutions of our sister circuits," 810 F. 2d 40, 41 (1987), a panel of the Second Circuit held that the denial was not immediately appealable under its earlier decision in *Miller* v. *Pleasure*, 425 F. 2d 1205 (CA2), cert. denied, 400 U. S. 880 (1970), which itself had overruled an even

earlier decision concluding the opposite, *Miller* v. *Pleasure*, 296 F. 2d 283 (CA2 1961), cert. denied, 370 U. S. 964 (1962). The position of the Second and Fourth Circuits, which is consistent with that of a number of the Circuits, conflicts with the position of two other Circuits. *Jackson* v. *Dallas Police Department*, 811 F. 2d 260 (CA5 1986) *(per curiam)*; *Slaughter* v. *City of Maplewood*, 731 F. 2d 587 (CA8 1984). The confusion in this area is further exemplified by the Ninth Circuit's position that civil rights plaintiffs proceeding under Title VII may immediately appeal a denial of their motion for appointment of counsel, while those proceeding under § 1983 may not. Compare *Wilborn* v. *Escalderon*, 789 F. 2d 1328 (CA9 1986), with *Bradshaw* v. *Zoological Society of San Diego*, 662 F. 2d 1301 (CA9 1981). I have previously dissented from denial of certiorari in a case raising this question in the context of suits filed under Title VII and § 1983, *Henry* v. *City of Detroit Manpower Department*, 106 S. Ct. 604 (1985) (WHITE, J., dissenting). The continued split amongst the Circuits on this issue warrants our granting certiorari.